IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDWARD SCOTT, Petitioner,

vs.

RON CHAMPION, Respondent.

No. 92-C-897-C

ORDER

Petitioner Scott filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss, arguing that Scott's petition contains unexhausted grounds for relief and should be dismissed. The court agrees.

To exhaust a claim, Scott must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

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Scott argues he should not have to exhaust his state remedies because doing so would be futile. He claims that if he filed a post-conviction application, the Oklahoma courts would rule that his claims were procedurally barred. However, Scott may be able to state sufficient reasons why he did not previously assert his claims. See Okla. Stat. tit. 22, § 1086.

The futility exception is a narrow one. It is made "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the end of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982).

The court finds Respondent's well reasoned motion to dismiss persuasive. Scott has not sufficiently shown that exhaustion of state remedies would be futile in this case. He admits that none of his grounds for relief have been exhausted. This action is accordingly **dismissed** without prejudice.

IT IS SO ORDERED this 15 day of July, 1993.

H. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION, as Conservator for Cimarron Federal Savings Association,

Plaintiff,

vs.

ANTHAN D. FULLER and JANICE M. FULLER, husband and wife; VICTOR W. ADERHOLD; ANGELA B. BRAUER; QUINTON R. DODD and VICKIE E. DODD, husband and wife; LAKELAND REAL ESTATE DEVELOPMENT, INC.; JAMES M. HENRY and KAREIN HENRY a/k/a KAREIN L. HENRY, husband and wife,

Defendants.

Case No. 89-C-755-C

(Consolidated into and with Case No. 89-C-753-C; Case No. 89-C-754-C; Case No. 89-C-756-C; Case No. 89-C-758-C; and Case No. 89-C-759-C)

JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE

Now on this 19th day of July, 1993, this matter comes on before the undersigned United States District Judge, upon the Motion for Summary Judgment filed in Consolidated Case No. 89-C-753-C by Plaintiff's predecessor in interest, Cimarron Federal Savings & Loan Association ("Old Cimarron"), and upon the Application for Default Judgment filed herein on ~~June~~ July 16, 1993 by Substituted Plaintiff Resolution Trust Corporation, as Receiver for Cimarron Federal Savings Association (the "RTC/Receiver"). The Court has jurisdiction over all parties and the subject matter of this action. The Court, upon review of the Order dated April 16, 1990, granting summary judgment in the Consolidated Cases and upon review of the RTC/Receiver's Application for Default Judgment and all pleadings and evidentiary materials filed in Consolidated Case No. 89-C-753-C, finds as follows:

1. On October 7, 1985, Defendants Anthan D. Fuller and Janice M. Fuller (the "Fullers"), Victor W. Aderhold ("Aderhold") and Angela B. Brauer ("Brauer"), and Quinton R. Dodd and Vickie E. Dodd (the "Dodds") (collectively the "Defendants") executed three separate promissory notes which are the subject of this action in favor of Phoenix Federal Savings and Loan, a former federally chartered savings and loan association ("Phoenix"). Quinton R. Dodd and Vickie E. Dodd, husband and wife, Angela B. Brauer, a single person, Victor W. Aderhold, a single person, Anthan B. Fuller and Janice M. Fuller, husband and wife, and other persons not parties herein, executed a single mortgage on certain real property in favor of Phoenix securing the payment of all such notes.

2. The Defendants collectively own an undivided four-fifths (4/5) of the interests in the Mortgaged Property. The remaining one-fifth (1/5) interest is held by Deryl L. Gotcher and Nadine N. Gotcher, husband and wife, who are not parties to this action but whose interest is also encumbered by the mortgage.

3. The Fullers, the Dodds, Aderhold and Brauer failed to pay the notes when due and are in default. On January 22, 1988, Phoenix instituted this action in foreclosure in Mayes County, Oklahoma.

4. The Fullers filed an Answer herein and asserted a counterclaim against Phoenix.

5. On August 31, 1988, the Federal Home Loan Bank Board ("FHLBB") declared Phoenix insolvent, and pursuant to 12 U.S.C. § 1464(d)(6)(A), the Federal Savings and Loan Insurance Corporation

("FSLIC") was appointed Receiver of the insolvent savings and loan association's assets and its liabilities. As Receiver of Phoenix, the FSLIC became the holder in due course of the insolvent association's assets, including the items which are the subject matter of this case. The FSLIC, in its capacity as Receiver of Phoenix, had the duty to realize the assets of said closed insolvent savings and loan association. As part of realizing said assets, the FSLIC assigned all right, title and interest in and to the instruments and related documents which are the subject matter of this case, to Cimarron Federal Savings and Loan Association ("Old Cimarron") on August 31, 1988, as more particularly set forth in resolutions of the Federal Home Loan Bank Board.

6. On September 14, 1989, this case was removed to this Court from Mayes County. This case was consolidated into Case No. 89-C-753-C on October 20, 1989.

7. Claims against Defendants Lakeland Real Estate Development, Inc., James M. Henry and Karein Henry a/k/a Karein L. Henry were dismissed without prejudice on March 30, 1990.

8. On April 16, 1990, this Court dismissed the counterclaim filed herein by the Fullers. Contemporaneously therewith, this Court found that there is no controversy as to any material fact and that Old Cimarron was entitled to judgment in its favor and against the Fullers as a matter of law as hereinafter set forth. The Motion for Summary Judgment filed by Old Cimarron in all cases consolidated into Case No. 89-C-753-C, including this Case No. 89-C-755-C, was granted. The Court thereafter granted

leave to obtain proper service upon Defendants Aderhold, Brauer and the Dodds.

9. On July 7, 1990, Aderhold and Brauer were served with process but have failed to answer or otherwise appear herein and are in default.

10. On August 21, 1990, the Dodds, and each of them, were served with process but have failed to answer or otherwise appear herein and are in default.

11. On April 19, 1991, pursuant to § 5(d)(2) of the Home Owners Loan Act of 1933 [as amended by § 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as enacted on August 9, 1989], the Director of the Office of Thrift Supervision (the "Director") issued Order No. 91-212 (the "Order") and placed Old Cimarron in receivership and assumed exclusive custody and control of the property and affairs of Old Cimarron. The Director, pursuant to the Order, appointed the RTC as Receiver of Old Cimarron, to have "all the powers of a conservator or receiver, as appropriate, granted under the Federal Deposit Insurance Act, and (when not inconsistent therewith) any other rights, powers, and privileges possessed by conservators or receivers, as appropriate, of savings associations under this Act and any other provisions of law."

12. The Director, through the Order, also organized Cimarron Federal Savings Association ("New Cimarron"), a new federally chartered mutual savings association. The Director, pursuant to the Order, appointed the RTC as conservator of New Cimarron, to have "all the powers of a conservator or receiver, as

appropriate, granted under the Federal Deposit Insurance Act, and (when not inconsistent therewith) any other rights, powers, and privileges possessed by conservators or receivers, as appropriate, of savings associations under this Act and any other provisions of law."

13. Subsequently, certain assets of Old Cimarron were sold and transferred by the RTC as the Receiver of Old Cimarron to New Cimarron, by and through its Conservator, the RTC.

14. New Cimarron, by and through its Conservator, the RTC, purchased the notes and mortgage that are involved in this cause of action.

15. New Cimarron, by and through its Conservator, the RTC, succeeded to certain rights and interests of Old Cimarron. The RTC/Conservator was substituted as plaintiff in this action on May 24, 1991.

16. On May 21, 1993, pursuant to § 5(d)(2) of the Home Owners' Loan Act of 1933 [as amended by § 301 of The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("the Act"), as enacted on August 9, 1989] ("HOLA"), the Director of the Office of Thrift Supervision issued Order No. 93-79 and placed New Cimarron, formerly in Conservatorship, in Receivership.

17. The Director of the Office of Thrift Supervision, pursuant to § 5(d)(2)(C) of the HOLA, § 11(c)(6)(B) of the Federal Deposit Insurance Act and Order No. 93-79, replaced the Resolution Trust Corporation as Conservator of New Cimarron with the Resolution Trust Corporation as Receiver for New Cimarron.

18. The RTC/Receiver assumed exclusive custody and control of the property and affairs of New Cimarron, including the notes and mortgage involved in this action, and is accordingly the proper party plaintiff herein as a matter of law.

19. The Court has acquired jurisdiction over the parties. The Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 and 12 U.S.C. § 1441a(*l*)(1).

20. On September 28, 1992, default was entered against Defendants Aderhold, Brauer and the Dodds for failure to answer, plead or otherwise defend in this action.

21. The RTC/Receiver should be granted a judgment in its favor against Anthan D. Fuller and Janice M. Fuller, and each of them, in the amount of $20,083.49 as of March 15, 1989, together with interest thereafter at the annual rate of 7.25% until the date of this judgment and thereafter at the statutory rate until paid, and such other continuing costs and expenses of suit as have been alleged in this action, including reasonable attorneys' fees and expenses (all such fees, expenses and costs to be determined upon application by the RTC/Receiver).

22. The RTC/Receiver should be granted a judgment in its favor against Victor W. Aderhold and Angela B. Brauer, and each of them, in the amount of $59,706.41 as of June 16, 1993, together with interest thereafter at a per diem rate of $13.03 until the date of this judgment and thereafter at the statutory rate until paid, and such other continuing costs and expenses of suit as have been alleged in this action, including reasonable attorneys' fees

and expenses (all such fees, expenses and costs to be determined upon application by the RTC/Receiver).

23. The RTC/Receiver should be granted a judgment in rem in its favor against Quinton R. Dodd and Vickie E. Dodd, and each of them, in the amount of $17,207.59 as of June 16, 1993, together with interest thereafter at a per diem rate of $1.51 until the date of this judgment and thereafter at the statutory rate until paid, and such other continuing costs and expenses of suit as have been alleged in this action, including reasonable attorneys' fees and expenses (all such fees, expenses and costs to be determined upon application by the RTC/Receiver).

24. The RTC/Receiver holds a valid mortgage lien in the aggregate amount of the judgments granted herein on the following described real property and all improvements thereon situated in Mayes County, Oklahoma:

> LOT NUMBERED ONE (1), IN BLOCK NUMBERED ONE (1), OF THE VILLAS OF LAKELAND, A SUBDIVISION IN MAYES COUNTY, STATE OF OKLAHOMA ACCORDING TO THE OFFICIAL SURVEY AND PLAT FILED FOR RECORD IN THE OFFICE OF THE COUNTY CLERK OF SAID COUNTY AND STATE (the "Mortgaged Property"),

which is a prior and superior lien in, to and against the Mortgaged Property, prior and superior to any claim, right, title, interest, lien or right or equity of redemption of all Defendants herein, and each of them, and of all persons claiming by, through or under any of the Defendants since the recording of the Notice of Lis Pendens filed herein, and all Defendants should be, from and after the date of the confirmation of the marshal's sale or sheriff's sale hereinafter ordered by the Court, barred, restrained and enjoined from

ever having or asserting any claim, right, title, interest, lien or right or equity of redemption in, to or against the Mortgaged Property, adverse to the right and title of the purchaser at said sale. The RTC/Receiver's mortgage shall not merge with this judgment, but the mortgage shall continue to secure payment from the remaining debtor/mortgagor who is not a party herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment be entered in favor of the RTC/Receiver against Anthan D. Fuller and Janice M. Fuller, and each of them, in the amount of $20,083.49 as of March 15, 1989, together with interest thereafter at the annual rate of 7.25% until the date of this judgment, and thereafter at the statutory rate until paid, the RTC/Receiver's reasonable attorneys' fees and expenses and all costs incurred herein and accruing hereafter (all such fees, expenses and costs to be determined upon application by the RTC/Receiver), for all of which let execution issue forthwith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that judgment be entered in favor of the RTC/Receiver against Victor W. Aderhold and Angela Brauer, and each of them, in the amount of $59,706.41 as of June 16, 1993, together with interest thereafter at the rate of $13.03 per diem until the date of this judgment, and thereafter at the statutory rate until paid, the RTC/Receiver's reasonable attorneys' fees and expenses and all costs incurred herein and accruing hereafter (all such fees, expenses and costs to be determined upon application by the RTC/Receiver), for all of which let execution issue forthwith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that judgment in rem be entered in favor of the RTC/Receiver against Quinton R. Dodd and Vickie E. Dodd, and each of them, in the amount of $17,207.59 as of June 16, 1993, together with interest thereafter at the rate of $1.51 per diem until the date of this judgment, and thereafter at the statutory rate until paid, the RTC/Receiver's reasonable attorneys' fees and expenses and all costs incurred herein and accruing hereafter (all such fees, expenses and costs to be determined upon application by the RTC/Receiver), for all of which let execution issue forthwith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the RTC/Receiver's Mortgage, recorded in Book 649 at Pages 817-820 of the records of the Mayes County Clerk, is a valid, prior and superior lien upon the Mortgaged Property in the aggregate amount of the judgments granted herein, prior and superior to any claim, right, title, interest, lien or right or equity of redemption of all Defendants herein and each of them, and of all persons claiming by, through or under any of such Defendants since the recording of the Notice of Lis Pendens in this cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that in the event the judgments herein granted to the RTC/Receiver, with interest, attorneys' fees, expenses and costs not be satisfied in full, a special execution and order of sale shall issue out of the office of the Court Clerk of the United States District Court for the Northern District of Oklahoma (the "Northern District Court Clerk"), directed, at the option of the RTC/Receiver, to either the United States marshal or to the sheriff of Mayes County, Oklahoma,

commanding the marshal or the sheriff to advertise for sale, according to law, as upon special execution, with appraisement, the Mortgaged Property free, clear and discharged of and from any and all rights, titles, interests, liens, claims and rights of redemption of all Defendants herein, and all persons claiming by, through or under them since the filing of the Notice of Lis Pendens herein; and that the Mortgaged Property be sold at a marshal's sale or sheriff's sale accordingly; and further that the proceeds of such sale be applied as follows: first, the costs of this action, including marshal's or sheriff's costs and other costs of sale; second, the aggregate amount of the judgments granted to the RTC/Receiver herein, including interest, attorneys' fees, expenses and other costs or advances; and third, that the balance, if any, be retained pending further order of the Court; that from and after the confirmation of the marshal's or sheriff's sale of the Mortgaged Property, all Defendants herein and all persons claiming by, through or under them since the recording of the Notice of Lis Pendens in this case, be and they are hereby barred, restrained and enjoined from having or asserting any right, title, interest, claim or lien or right or equity of redemption in, to or against the Mortgaged Property or any part thereof, adverse to the right and title of the purchaser at said sale; provided that the RTC/Receiver's mortgage shall not merge into this judgment, but shall continue to secure payment from the remaining debtor/mortgagor who is not a party herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon confirmation of said sale, the marshal or the sheriff who

conducted the sale should execute and deliver a good and sufficient deed to the Mortgaged Property to the purchaser thereof, which deed shall convey all the right, title, interest, equity and right of redemption of any and all parties herein, and each of them, in and to the Mortgaged Property, subject to the RTC/Receiver's mortgage, and that upon application of the purchaser, the Northern District Court Clerk shall issue a writ of assistance to the marshal or sheriff who conducted the sale, who shall forthwith place the Mortgaged Property in the full and complete possession and enjoyment of such purchaser.

UNITED STATES DISTRICT JUDGE

APPROVED:

Gary R. McSpadden, OBA # 6093
Dana L. Rasure, OBA # 7421
Barbara J. Eden, OBA # 14220
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Attorney for Defendants
Anthan D. Fuller and
Janice M. Fuller

850013.010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MID-STATES AIRCRAFT ENGINES, INC., an Oklahoma corporation, et al.,

Plaintiffs,

vs.

TELEDYNE INDUSTRIES, INC. d/b/a TELEDYNE CONTINENTAL AIRCRAFT, PRODUCTS DIVISION, a California corporation, et al.,

Defendants.

No. 93-c-78-e

ORDER OF TRANSFER

This case arises out of a dispute regarding a settlement agreement[1] which resolved a previous case. Pending are Defendants' Motions to Dismiss (docket #s 8 and 15) and Defendant Teledyne's Motion to Transfer (docket #10). The Court has reviewed the record in light of the applicable and concurs with the Alabama Court that the forum selection clause of the underlying Distributorship Agreement is enforceable and applicable to the case at bar. Accordingly, Teledyne's Motion to Transfer will be granted and this case shall be transferred to the United States District Court for the Southern District of Alabama, Southern Division, case no. 93-0078-T-M. Defendants' Motions to Dismiss are denied as moot.

So ORDERED this 19th day of July, 1993.

[1]The agreement is under seal.

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JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 7-20-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK D. EGERTON, Plaintiff,	)	
v.	)	No. 92-C-855 E
FAYE POLVADORE TRUCKING CO., a Texas corporation, and PLAINS LIVESTOCK TRANSPORTING, INC., a Texas corporation, and GEORGE L. WALKER, Defendants.	)	

FILED

JUL 19 1993

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 19 day of July, 1993, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ JAMES O. ELLISON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. CHARLES F. GILLE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 90-C-468-E

ORDER AND JUDGMENT

Findings of Fact

1. On May 31, 1983, Plaintiff J. Charles F. Gille and his wife Vicki L. Gille filed a joint 1982 tax return showing his address to be 632 S. 1000 W., Orem, Utah, 84057.

2. Plaintiff did not file a tax return, joint or otherwise, for the tax year 1983.

3. In September of 1984, Plaintiff and Vicki Gille filed a change of address form with the United States Post Office notifying them of their move from Utah.

4. On January 7, 1985, the IRS issued and mailed a notice of balance past due relating to the deficiency for the tax year 1982. Although the IRS mailed that notice to the Orem, Utah address, the United States Post Office forwarded the notice to the Plaintiff and his wife, 6512 N. Missouri, Oklahoma City, Oklahoma, 73111-7928".

5. In January of 1985, the United States Post Office forwarded the Gille's mail, including the Notice of Deficiency for the tax year 1982, to their Oklahoma City address.

6. In March of 1985, Plaintiff and Vicki Gille moved to 2944 Lakeside Drive, Oklahoma City, Oklahoma. The plaintiff again filed

a change of address form with the United States Post Office.

7. In April of 1985, Vicki Gille became employed at Macklanburg-Duncan Co. in Oklahoma City, Oklahoma. A bank account was soon thereafter opened in Vicki's name at Liberty National Bank & Trust in Oklahoma City, Oklahoma for the purpose of the direct deposit of her paychecks from Macklanburg-Duncan.

8. On May 25, 1985, Bruce F. McGuigan, acting under power of attorney for Vicki L. Gille, mailed to the IRS at its Ogden, Utah center, a cashier's check in the amount of $4.982.48 representing full payment of the deficiency reflected in the January 1985 notice of deficiency for the tax year 1982. The accompanying letter from Mr. McGuigan stated in pertinent part as follows[1]:

> I am the attorney for [Mrs. Gille]. She and her husband filed a joint return for the year, 1982. I understand there has been considerable correspondence between the Internal Revenue Service and her husband. She wishes to resolve this matter, personally, between her and the Internal Revenue Service.
>
> Enclosed is a Cashier's Check in the amount of $4,982.48, which is in payment of the $4,713.42 in tax, penalty and interest reflected in your notice of January 25, 1985, [plus interest on the deficiency]....
>
> Mrs. Gille does not wish to involve her husband in her efforts to resolve this matter, thus we will appreciate your directing all correspondence pertaining to this matter to me (enclosed is Power of Attorney, Form 2848)....

9. On July 1, 1985, Vicki Gille mailed a handwritten letter requesting a receipt for all of the monies she had paid to the IRS. The letter referred the IRS to "Vicki L. Rebeck (Gille)", identified her social security number, and requested the IRS mail

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[1]Mrs. Gille was present at the trial and consented to the disclosures of her tax return information for purposes of these proceedings.

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[1]Mrs. Gille was present at the trial and consented to the disclosures of her tax return information for purposes of these proceedings.

the receipt for the monies collected to: "Vicki Lynn Rebeck (Gille) c/o 6512 N. Missouri, Oklahoma City, OK, 73111.

10. On August 14, 1985, the IRS issued and mailed a reply to "Vicki Lynn Rebeck" at her Oklahoma City address indicating that they were looking into her case and would respond more fully in sixty days. The letter stated in part:

> If you have any questions about this letter, please write to us at the address shown on this letter. If you prefer you may call the IRS telephone number listed in you local directory. An employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

The address shown on the letter was "Department of the Treasury, Internal Revenue Service, Ogden, UT, 84201."

11. On October 14, 1985, the IRS issued and mailed a letter to Vicki Rebeck at her Oklahoma City address which made reference to Mr. Gille's taxpayer identification number as follows:

> Enclosed is a record of your 1982 account (filed jointly under 443-50-7817). We hope this information is helpful.
>
> If you have any questions, please write to us at the address shown on this letter....

12. The IRS recorded a change of address for Vicki Rebeck (Gille) in October of 1985. The IRS did not at this time record a change of address for Charles Gille.

13. In January of 1986, Vicki filed a "married but filing separate" tax return for the tax year 1985 which reflected the Gilles' Oklahoma City address. The return did not reflect the name or social security number of her spouse, Charles F. Gille. The tax refund received by her for that year was deposited into her Liberty National Bank & Trust account.

14. On May 5, 1986, a notice of deficiency was mailed to Charles F. Gille at the Utah address. The notice was returned to the IRS as undeliverable.

15. On May 26, 1986, another notice of deficiency was mailed to Charles F. Gille at the Utah address. The notice was returned to the IRS as undeliverable. Specifically, the outside of the notice stated, "RETURN TO SENDER, NO FORWARDING ORDER ON FILE, UNABLE TO FORWARD." The change of address form filed in 1985 by the taxpayer had expired.

16. In December of 1986, the IRS mailed a Form 1040 to Vicki Gille at the Oklahoma City address. The Form 1040 had an address label affixed to it which reflected the Gille's Oklahoma City address. Vicki filed that form 1040 for the tax year 1986 in February of 1987. The return did not reflect either the name or social security number of her spouse Charles F. Gille.

17. In January of 1987, the IRS filed a "dummy" Form 1040 for the tax year 1983 using Charles F. Gille's name, but reflecting both Charles' and Vicki's social security numbers. The Orem, Utah address was filled in on that dummy form, in spite of the IRS's communications with Mrs. Gille and the IRS's knowledge of the couple's Oklahoma City address.

18. A tax deficiency for the tax year 1983 was assessed against plaintiff on March 23, 1987.

19. Revenue Officer Timothy Andrew Anderson was initially assigned to the J. Charles F. Gille file for investigation. Anderson was located in the Ogden, Utah branch of the Internal

Revenue Service. At the time of commencing this investigation, Anderson was still in training and under supervision. All notices issued in reference to J. Charles F. Gille were sent from the Ogden, Utah branch of the Department of Treasury, Internal Revenue Service.

20. In October of 1987, the IRS mailed a "preliminary letter" regarding the assessed tax liability for the year 1983 to Charles F. Gille at the Utah address. The letter was returned as undeliverable by the United States Post Office to the IRS in the same month.

21. On December 31, 1987, a "notice of deficiency" for Plaintiff's 1983 individual income tax liability was issued and mailed to plaintiff at the Orem, Utah address. In January of 1988, the notice was returned by the United States Post Office as undeliverable.

22. In February of 1988, Vicki filed her Form 1040 tax return "married but filing separate" using the IRS label which reflected the Oklahoma City address. The return did not reflect either the name or social security number of her spouse, Charles F. Gille.

23. In July of 1988, Revenue Officer Timothy Andrew Anderson ordered an "IRP" transcript using both Charles' and Vicki's social security numbers.

24. In August of 1988, the IRS mailed a "notice of assessment" to Charles F. Gille to the Utah address. The notice was returned as undeliverable by the United States Post Office to the IRS.

25. In September of 1988, the IRS mailed a "final notice" of assessment and intent to levy to Charles F. Gille to the Utah address. The notice was returned as undeliverable by the United States Post Office to the IRS.

26. In November of 1988, the IRS issued and mailed a notice of levy on Vicki's paychecks to Macklanburg-Duncan Company, a notice of levy on Vicki's accounts at Liberty Nation Bank & Trust, and a notice of federal tax lien in Utah.

27. In November of 1988, the United States Post Office returns as undeliverable the "Taxpayer Copy" of the notice of federal tax lien in Utah.

28. On January 25, 1989, Plaintiff J. Charles F. Gille moved to 1700 West Quantico Street, Broken Arrow, Oklahoma, 74011. Plaintiff filed a change of address form with the United States Post Office.

29. On January 27, 1989, the IRS issued and mailed the following items to the stated entities: a notice of levy to the Burroughs Corporation, a notice of levy to Lytron Systems, a notice of levy to Burroughs Employee's Credit Union, a notice of levy to American Savings Association, a notice of levy to Utah Technical College, a notice of levy to Universal Campus Credit Union, and a notice of lien to the County Clerk in Tulsa County.

30. On March 24, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office in Orem, Utah reflecting the Gille's Utah address. The tracer was returned to the IRS by the United States Post Office reflecting that John

25. In September of 1988, the IRS mailed a "final notice" of assessment and intent to levy to Charles F. Gille to the Utah address. The notice was returned as undeliverable by the United States Post Office to the IRS.

26. In November of 1988, the IRS issued and mailed a notice of levy on Vicki's paychecks to Macklanburg-Duncan Company, a notice of levy on Vicki's accounts at Liberty Nation Bank & Trust, and a notice of federal tax lien in Utah.

27. In November of 1988, the United States Post Office returns as undeliverable the "Taxpayer Copy" of the notice of federal tax lien in Utah.

28. On January 25, 1989, Plaintiff J. Charles F. Gille moved to 1700 West Quantico Street, Broken Arrow, Oklahoma, 74011. Plaintiff filed a change of address form with the United States Post Office.

29. On January 27, 1989, the IRS issued and mailed the following items to the stated entities: a notice of levy to the Burroughs Corporation, a notice of levy to Lytron Systems, a notice of levy to Burroughs Employee's Credit Union, a notice of levy to American Savings Association, a notice of levy to Utah Technical College, a notice of levy to Universal Campus Credit Union, and a notice of lien to the County Clerk in Tulsa County.

30. On March 24, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office in Orem, Utah reflecting the Gille's Utah address. The tracer was returned to the IRS by the United States Post Office reflecting that John

Charles Gille was "not known at address given."

31. On April 4, 1989, Revenue Officer Tim Anderson visited the current resident at 632 S. 1000 W., Orem, Utah, to investigate as to the current location of Charles F. Gille.

32. On April 4, 1989, Revenue Officer Tim Anderson visited the current resident at 630 S. 1000 W., Orem, Utah, to investigate into the current location of Charles F. Gille.

33. On April 4, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office in Oklahoma City, Oklahoma, reflecting the Oklahoma City address. The postal tracer was returned to the IRS by the United States Post Office with the Broken Arrow address on it.

34. On April 14, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office at Broken Arrow. The tracer was returned by the United States Post Office stating "mail is delivered to the address given."

35. In a letter to the IRS dated June 2, 1989, Charles F. Gille indicated that he never actually received any of the notices of deficiency and requested a variety of information pursuant to the Freedom of Information Act. This letter is referred to by the IRS as a "protest letter".

36. On June 12, 1989, Charles F. Gille's "protest letter" is received by the IRS, and specifically by Revenue Officer Tim Anderson.

37. On October 5, 1989, Revenue Officer Victor Christian made a field call to the Broken Arrow address and saw the following

vehicles in the driveway--a van, a pontiac wagon and a boat. Revenue officer Christian recorded the tag numbers on each of the vehicles. The next day the Revenue Officer called the Oklahoma Department of Motor Vehicles and the County Courthouse and determined that none of the assets were in Charles Gille's name.

Conclusions of Law

1. Plaintiff contends that the agents of the IRS knowingly made unauthorized disclosures of Plaintiff's return information by virtue of the fact that the assessment made against Plaintiff was procedurally invalid. Plaintiff asks for monetary relief as a result of these alleged wrongful disclosures.

2. Three issues have been presented for determination: (1) whether this court has jurisdiction over the subject of this action,[2] (2) whether the notice requirements set forth at Title 26, United States Code, Section 6303 were followed such that the IRS exercised reasonable diligence in attempting to determine Plaintiff's correct address where express "clear and concise" notice of a change of address was not given directly by the Plaintiff to the IRS, and (3) whether disclosures of Plaintiff's tax return information were made in violation of 26 U.S.C. § 6103.

3. With respect to the first of the three issues, we begin

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[2] Although the parties agreed in the agreed pre-trial order that this court had subject matter jurisdiction over this action, defendant has raised this issue in it's proposed findings of fact and conclusions of law, which was submitted as a post-trial brief.

by noting that a party may raise subject matter jurisdiction as an issue at any stage of the proceedings by the parties. First State Bank & Trust Co. of Guthrie, Oklahoma v. Sand Springs State Bank of Sand Springs, Oklahoma, 528 F.2d 350 (10th Cir. 1976). In this case, the issue was first raised post-trial by the government. Specifically, the government asserts herein that Mr. Gille cannot challenge the procedural validity of the assessment until after he has paid the deficiency and brings a refund suit under Title 26, United States Code, Section 7422(a). The government relies in particular on a line of cases which have held that when the taxpayer challenges the merits of a tax assessment (including challenges to notice and demand), rather than merely challenging the procedural regularity of the tax lien and the procedures used to enforce the lien, then sovereign immunity is not waived under § 2410 (action to quiet title) and a district court does not have jurisdiction over an action to quiet title until the taxpayer has paid the taxes in dispute and seeks refund pursuant to § 7422(a). See Schmidt v. King, 913 F.2d 837 (10th Cir. 1990)(holding that the taxpayer's action characterized as one to quiet title actually challenged the deficiency assessment, and specifically the notice and demand given, and thus the district court lacked jurisdiction over the action until after the taxpayer had paid the taxes in dispute). Egbert v. U.S., 752 F.Supp. 1010, 1014 (D.Wyo. 1990) ("when taxpayers contest assessment and notice and demand procedures they are actually challenging the adjudication of whether they owe taxes"), aff'd, 940 F.2d 1539 (10th Cir. 1991),

cert denied, ---U.S.---, 112 S.Ct. 666, 116 L.Ed.2d 756 (1991). This is not a quiet title action under 26 U.S.C. § 2410. The government's reliance on this line of cases appears to be misplaced in that this action is not one to quiet title and therefore does not challenge whether the taxes are due and owing. Rather Plaintiff here merely seeks recovery for alleged unauthorized disclosures on the grounds that the notices of deficiency were procedurally invalid.

4. The next issue for resolution is whether notice pursuant to Title 26, United States Code, Section 6303(a) was given. The IRS is required by § 6212 to send a notice of deficiency to the taxpayer at his/her "last known address" to satisfy the notice requirement. The term "last known address" is not defined in the statutes or the regulations, but instead has come to be defined by a substantial body of case law. The term has been defined to mean "'that address to which the IRS reasonably believes the taxpayer wishes the notice sent.'" Cyclone Drilling, Inc. v. Kelley, 769 F.2d 662, 664 (10th Cir. 1985) (quoting United States v. Ahrens, 530 F.2d 781, 785 (8th Cir. 1976); Sorrentino v. Ross, 425 F.2d 213, 215 (5th Cir. 1970); Delman v. Comm'r of Internal Revenue, 384 F.2d 929, 932 (3d Cir. 1967), cert. denied, 390 U.S. 952, 88 S.Ct. 1044, 19 L.Ed.2d 1144 (1968)). As explained by the Tenth Circuit in Cyclone Drilling:

> ...In recognition of obvious nationwide administrative realities, the burden is on the taxpayer to provide "clear and concise" notice of his current address to the IRS; the IRS is otherwise entitled to rely on the address shown on the taxpayer's tax return for the year in question. "Clear and concise" notice is notice by which the taxpayer indicates to

> the IRS that he wishes the new address to replace all old addresses in subsequent communication. Such an indication of replacement may be either explicit or implicit....
>
> In general, "[t]he relevant inquiry pertains to the IRS's knowledge rather than to what may in fact be the taxpayer's current address in use.
>
> The IRS is, however, required to use "reasonable diligence" in attempting to ascertain the taxpayer's correct address. The burden of proof is on the taxpayer to prove that this "reasonable diligence" was not exercised.

Id. at 664 (citations omitted).

5. Mr. Gille contends that the facts warrant a finding that the IRS failed to exercise reasonable diligence in that they had located his wife, with whom his last return was filed, at their Oklahoma City address, and yet they sent all the notices to the Utah address. The IRS maintains that "administrative realities" preclude them from having to cross-reference between the husband and wife. We cannot agree.

6. It is true that the Tenth Circuit Court of Appeals has held that cross-referencing addresses between business-related return information

and individual return information amounts to an "unreasonable administrative burden." Howell v. U.S., 982 F.2d 528 (10th Cir. 1992) relying on Stein v. Comm'r, 60 T.C.M. (CCH) 211, 216 (1990)(recognizing unreasonable administrative burden of cross referencing individual taxpayer accounts with business accounts, and noting that "[t]axpayers can, and more often than not do, have different addresses for their residence and their business") and relying on Lueck v. Comm'r, 60 T.C.M. (CCH) 27, 30-31 (1990)(recognizing that IRS maintains business and individual tax

records separately)); and Guillen v. Barnes, 819 F.2d 975 (10th Cir. 1987)(refusing to impute knowledge of an address change to the division of the IRS that issued the deficiency notices, based on information received in another IRS division, from a W-4 form, that was not identified as new permanent address information). However, the cross-referencing required of the IRS in this case amounted to no more than identifying Mrs. Gille's social security number which was located in the file for Mr. Gille on the "dummy" joint return. Once Mrs. Gille's name was identified to be Vicki Rebek, the IRS needed only refer to her file to identify the Oklahoma City address. A direct letter from Mrs. Gille was mailed identifying their Oklahoma City address. The fact that the IRS sent a letter to Mrs. Gille at the Oklahoma City address in late 1985, cross-referencing her husband's social security number, illustrates the administrative ease with which the IRS could have mailed the notices to the Oklahoma City address.

7. Although the court does not in any way advocate the failure of any taxpayer to file tax returns, this court cannot find from the evidence presented that the IRS exercised reasonable diligence in attempting to ascertain Mr. Gille's correct address for purposes of satisfying the notification requirements of Title 26, United States Code, Section 6212.

8. The final issue for determination by this court is whether any disclosures were made in violation of Title 26, United States Code, Section 6103(a), which generally prohibits disclosure of tax return information by federal employees, except for the

specific reasons enumerated by the statute. Section 6103 does permit disclosure of return information for the purposes of tax administration, as provided in subsection (k)(6):

> An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary... with respect to enforcement of any other provision of this title.

Recovery for wrongful disclosure under § 6103 requires a preliminary finding that the government knowingly or negligently failed to comply with required procedures prior to recording liens or levies, thereby rendering public communication relating to tax return information a negligent or wrongful disclosure.

9. As discussed above, the failure of the IRS to exercise reasonable diligence in attempting to ascertain Mr. Gille's correct address amounts to a negligent failure to comply with the required notification procedures. Accordingly, the collection activities were not authorized, and any disclosures of return information were in violation of § 6103.

10. We next turn to Title 26, United States Code, Section 7431 to determine the amount of damages to which Plaintiff is entitled for the unauthorized disclosures. Subsection (c) entitles plaintiff to the following:

> (a) ... In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of--
> (1) the greater of--
> (A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of--
(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus
(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus
(2) the costs of the action.

Plaintiff put on no proof of any actual damages sustained, and the evidence does not warrant a finding of willfulness or gross negligence so as to justify an award of punitive damages. Plaintiff is therefore entitled to $1,000 for each unauthorized disclosure that occurred.

11. The government contends that any unauthorized disclosures fall within the "good faith but erroneous interpretation of § 6103" defense, available by virtue of Title 26, United States Code, Section 7431, subsection (b), and they therefore are protected from civil liability in this case. This court cannot find from the evidence presented that the IRS agent acted in good faith where, as here, the IRS agent failed to attempt to identify the taxpayer's Oklahoma City address by referring to Mrs. Gille's social security number which was located on the dummy form filed by the IRS on behalf of the taxpayer and his wife. Furthermore, the fact that the IRS corresponded with the taxpayer's wife at their Oklahoma City address during the period in question suggests that the agent was not acting in good faith in attempting to determine the taxpayer's correct address.

12. All that remains is to determine the exact number of unauthorized disclosures of "return information" which occurred. "Return information" is defined in Title 26, United States Code,

Section 6103(b)(2) as follows:

> (A) a taxpayer's identity, the mature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
>
> (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
>
> but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer....

The court finds from the evidence that the following disclosures of "return information" were unauthorized and were not made in "good faith":

a. On or about November 7, 1988, Revenue Officer Tim Anderson issued and mailed a notice of levy to Macklanburg-Duncan Company.

b. On or about November 7, 1988, Revenue Officer Tim Anderson mailed notices of levy to Liberty National Bank.

c. On November 21, 1988, a notice of federal tax lien was filed in Utah County, Utah against Plaintiff at the Orem address.

d. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Burroughs Corporation.

e. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Lytron Systems.

f. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Burroughs Employees Credit Union.

g. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to American Savings Association.

h. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Utah Technical College.

i. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Universal Campus Credit Union.

j. On March 2, 1989, Revenue Officer Tim Anderson disclosed taxpayer's name and other "return information", as that term is defined in 26 U.S.C. § 6103(b)(2) to "Jerry" at Unisys.

k. On April 4, 1989, Revenue Officer Tim Anderson visited the current residents at 632 S. 1000 W., Orem, Utah, and disclosed "return information" as that term is defined in 26 U.S.C. § 6103(b)(2).

l. On April 4, 1989, Revenue Officer Tim Anderson visited the current resident at 630 S. 1000 W., Orem, Utah, and disclosed "return information" as that term is defined in 26 U.S.C. § 6103(b)(2).

m. On September 18, 1989, Revenue Officer Victor Christian filed a notice of lien against Plaintiff in Tulsa County, Oklahoma.

The government is therefore liable to the Plaintiff for each of these 13 unauthorized disclosures.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the Plaintiff and against the Defendant in the amount of $13,000.00 plus the costs of this action.

ORDERED this 19th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

90-468
7-26-90

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL DAVID MORNES, Petitioner,

vs.

RON CHAMPION, Respondent.

No. 92-C-806-E

ORDER

Petitioner Mornes filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss. In his motion, Respondent argues that Mornes' petition contains unexhausted grounds for relief and should therefore be dismissed. The court agrees.

To exhaust a claim, Mornes must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

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Mornes' petition raises the following three grounds for relief:

1. The Petitioner was denied due process of law by the trial court erroneously informing the petitioner of the elements of the crime (emphasis added).
2. The Petitioner was denied effective assistance of counsel by his trial attorney failure to properly advise the petitioner of his right to a pre-sentencing investigation report and for failure to provide the petitioner with effective assistance of counsel during the statutory period for perfecting a direct appeal.
3. The petitioner was denied due process of law by being denied a rule of court that others enjoy, in violation of the due process clause of the 14th amendment of the United States Constitution.

Mornes' only appeal to the Oklahoma Court of Criminal Appeals was an appeal from the denial of post-conviction relief. In that appeal, Petitioner raised only the following two grounds for relief:

1. The district court's claim that the petitioner failed to pass the two prong test set forth in Strickland v. Washington is without merit;
2. The State's claim that the petitioner gave no reason for not filing a direct appeal is without merit.

Thus, it appears that Mornes' ineffective assistance of counsel claim is the only exhausted ground for relief in the instant petition.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal habeas corpus petition that contains exhausted and unexhausted grounds for relief must be dismissed by the district court. The Court stated:

> In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice

> of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510.

Accordingly, Respondent's motion to dismiss is granted, and this case is closed.

IT IS SO ORDERED this 19th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEONARD DAVID CARTER,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-1038-E

ORDER

Respondent filed a motion to dismiss for failure to exhaust state remedies (docket #5). Petitioner has failed to respond to the motion. Pursuant to Local Rule 15(A), Petitioner's failure constitutes a waiver of objection and a confession of the matters raised by the motion. Furthermore, it is clear Respondent's motion prevails on its merits. Accordingly, Respondent's motion to dismiss is **granted**, and this action is hereby **dismissed.**

SO ORDERED THIS 19th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HILTON ROY BABER,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 92-C-757-E

ORDER

Petitioner filed this action for habeas relief pursuant to 28 U.S.C. § 2254. He alleges as his sole ground for relief that his indeterminate sentences of ten years to life are illegal.

On September 10, 1976, Petitioner pled guilty to second degree murder for causing the deaths of Eugene Blair and Joseph McCurly. The crimes were committed on or about August 21, 1975.

It is well settled that the law in force at the time a crime is committed is the law governing the punishment that can be imposed. At the time the crimes were committed in this case, an indeterminate sentence of ten years to life was appropriate for second degree murder. See Bowman v. State, 789 P.2d 631 (Okl.Cr. 1990).

The court can find no constitutional violation regarding Petitioner's indeterminate sentences. Accordingly, the instant petition is denied, and this case is dismissed.

SO ORDERED THIS 19th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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FILED

JUL 16 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff, v. AMERICAN AIRLINES, INC., ET AL. Defendants.	Consolidated Case Nos. 89-C-868-B 89-C-869-B 90-C-859-B

ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this 16 day of July, 1993, upon presentation of the Stipulation for Dismissal Without Prejudice executed by Plaintiff Atlantic Richfield Company and Defendant Siegfried Grimm, the Court finds and adjudges that all claims of Atlantic Richfield Company set forth herein against Siegfried Grimm should be and are hereby dismissed without prejudice to any future action upon such claims and that each of these parties shall bear and be responsible for its own costs and expenses incurred herein.

S/ THOMAS R. BRETT
Judge

Approved as to form and content:

Gary A. Eaton, Attorney for
Atlantic Richfield Company

Siegfried Grimm

AXA93B43.SEL (6/30/93 2:50pm)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNION PACIFIC RESOURCES COMPANY, a Delaware corporation,

Plaintiff,

v.

TRANSOK, INC., an Oklahoma corporation, and PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation,

Defendants.

Case No. 92-C-001-B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure Rule 41, the parties hereby stipulate to a dismissal of this action with prejudice. The parties agree that they shall bear their own respective attorneys' fees and costs incurred in connection with this action.

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Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ANN L. MEADOWS a/k/a ANN LYNNETTE MEADOWS; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	**CIVIL ACTION NO. 93-C-308-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16th day of July, 1993. The Plaintiff appears by F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, appears not, having previously filed its Answer, claiming no right, title or interest in the subject property; the Defendant, County Treasurer, Tulsa County, Oklahoma, appears by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, appears not, but makes default.

The Court, being fully advised and having examined the court file, finds that the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, was served with Summons and Complaint on May 5, 1993; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 22, 1993;

and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 20, 1993.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on May 12, 1993; that the Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on May 12, 1993, claiming no right, title or interest in the subject property; and that the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Nineteen (19), Block Three (3), VILLAGE SQUARE ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on October 10, 1986, Gregory C. Meadows and Ann L. Meadows executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $47,700.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Gregory C. Meadows and Ann

L. Meadows executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated October 10, 1986, covering the above-described property. Said mortgage was recorded on October 14, 1986, in Book 4976, Page 477, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 20, 1991, a Decree of Divorce was filed in the District Court In and For Tulsa County, State of Oklahoma, granting the Plaintiff, Ann Lynnette Meadows, the above-described subject property.

The Court further finds that on August 24, 1992, Gregory Chris Meadows executed a Quit-Claim Deed to Ann Lynnette Meadows regarding the above-described property, which was recorded on September 17, 1992 in the records of Tulsa County, Oklahoma, in Book 5436, Page 1456.

The Court further finds that the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, is indebted to the Plaintiff in the principal sum of $45,475.71, plus interest at the rate of 9.5 percent per annum from October 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $12.12 for service of Summons and Complaint.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $17.00 which became a lien on the property. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, is in default and has no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, in the principal sum of $45,475.71, plus interest at the rate of 9.5 percent per annum from October 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.54 percent per annum until paid, plus the costs of this action in the amount of $12.12 for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $17.00, plus penalties and

interest, for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Ann L. Meadows a/k/a Ann Lynnette Meadows and the Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Ann L. Meadows a/k/a Ann Lynnette Meadows, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $17.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendant,
County Treasurer, Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-308-B

PP/esr

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DATE JUL 19 1993

FILED

JUL 16 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ARCHIE SCOTT AND MAXINE SCOTT HIS WIFE, AND MARK SCOTT,

Plaintiffs,

vs.

BOARD OF COMMISSIONERS OF THE COUNTY OF DELAWARE, et al.,

Defendants.

Case No. 92-C-279-B

ORDER OF DISMISSAL

On this 16th day of July, 1993, upon consideration of the Stipulation for Dismissal filed herein by all of the parties hereto, and for good cause stated therein, this action is hereby dismissed.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARSCO CORPORATION,	:	
Plaintiff,	:	
v.	:	Case No. 93-C-367B
FABSCO, INC., ARCHIMEDES' SYSTEMS, INC., R. MURRAY CARR, and ROBERT K. ROTHENBUCHER,	:	
Defendants.	:	

ORDER

The parties, having entered into a Settlement Agreement in this matter and having stipulated to the dismissal with prejudice of all claims presented by the complaint in the above-identified action;

IT IS HEREBY ORDERED that the above-identified action be dismissed with prejudice, each party to bear its own costs and attorneys' fees.

Jul. 16, 1993
Date

Thomas R. Brett
United States District Judge

APPROVED, ACCEPTED AND AGREED TO:

July 12, 1993
Date

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July 12, 1993
Date

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July 13, 1993
Date

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ATTORNEY FOR DEFENDANTS ARCHIMEDES'
SYSTEMS, INC. and MURRAY CARR

ENTERED ON DOCKET

DATE 7-16-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 15 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WALTER R. BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 93-C-539-E**
	)	
CITGO PETROLEUM CORPORATION,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of the cause of action of Plaintiff, Walter R. Brown, against Defendant, Citgo Petroleum Corporation.

DATED this 13th day of July, 1993.

Walter R. Brown
Plaintiff

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: Kathy R. Neal
Kathy R. Neal
320 South Boston Ave., Suite 500
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(918) 582-1211

Attorneys for Defendant,
Citgo Petroleum Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEONARD JAMES TERNES,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 92-C-767-B

ORDER

Plaintiff is a federal inmate previously incarcerated at the Tulsa County Jail. He filed this action pursuant to 42 U.S.C. § 1983. Defendants are Tulsa County Sheriff Stanley Glanz, and U.S. Marshal Donald Crowl.

Plaintiff's complaint contains three counts. In Count I, he claims he was denied adequate medical treatment. Count II alleges he was denied outdoor recreation. Count III alleges he was denied adequate housing space. In a commendably thorough motion for summary judgment, Defendant Glanz has refuted Plaintiff's claims and shown he was not deliberately indifferent to Plaintiff's needs. See, e.g., Wilson v. Seiter, ___ U.S. ___, 111 S. Ct. 2321 (1991). Plaintiff has not substantially opposed Defendant's motion. Defendant's motion shall be granted for the reasons stated in his motion.

Defendant Crowl has also filed a meritorious motion to dismiss/motion for summary judgment. In addition, Plaintiff has written a letter to the court seeking to withdraw his claims

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against Defendant Crowl. Accordingly, Defendant Crowl's motion shall be granted as well.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Defendant Glanz's motion for summary judgment is granted;

2. Defendant Crowl's motion to dismiss/motion for summary judgment is granted;

3. This action is dismissed.

SO ORDERED THIS 16 day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE HOME-STAKE OIL & GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION,

Plaintiffs,

vs.

TRI TEXAS, INC., CHARLES S. CHRISTOPHER, AGO COMPANY, and AGR CORPORATION,

Defendants.

Case No. 91-C-930-E

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs The Home-Stake Oil & Gas Company and The Home-Stake Royalty Corporation, and Defendants Tri Texas, Inc., Charles S. Christopher, AGO Company and AGR Corporation, hereby stipulate that all claims asserted by each party against the other parties in the above-styled action are hereby dismissed

without prejudice, with each party to bear its own costs and attorneys' fees.

ATTORNEYS FOR PLAINTIFFS:

TONY W. HAYNIE, OBA #11097
P. SCOTT HATHAWAY, OBA #13695

By: Tony W. Haynie
Tony W. Haynie

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By: Frank de Spiegelberg
Frank Spiegelberg

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EUGENE T. FOUST, et al.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-C-909-C
	)	
ORAL ROBERTS EVANGELICAL ASSOCIATION, et al.,	)	
	)	
	)	
Defendants.	)	

JUDGMENT

This matter came on for consideration of the motion for summary judgment of certain defendants. The issues having been duly considered and a decision having been duly rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for defendants Oral Roberts, Richard Roberts, Oral Roberts Evangelical Association, Oral Roberts University, Clarence Boyd, Gary Gibson and Larry Johnson, and against plaintiffs.

IT IS SO ORDERED this 13th day of July, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EUGENE T. FOUST, et al.,

Plaintiff,

vs.

No. 92-C-909-C

ORAL ROBERTS EVANGELICAL ASSOCIATION, et al.,

Defendants.

ORDER

Before the Court is the motion of the defendants Oral Roberts, Richard Roberts, Oral Roberts Evangelical Association, Oral Roberts University, Clarence Boyd, Gary Gibson and Larry Johnson to dismiss, converted into a motion for summary judgment by Order of December 8, 1992.

Plaintiffs' Complaint alleges a violation of their civil rights actionable under 42 U.S.C. §1983 as well as state law claims. The background events involve the investigation and prosecution of plaintiff Eugene Foust which resulted in his expulsion from Oral Roberts University. Movants filed a motion to dismiss, contending that the claims were barred based upon the doctrines of res judicata and collateral estoppel. The Court converted the motion to one for summary judgment pursuant to Rule 12(b) F.R.Cv.P. Although given an opportunity to respond, plaintiffs have failed to do so. Pursuant to Rule 15 of the Local Rules, the motion is deemed confessed; nevertheless, the Court has independently reviewed

the record.

Movants are correct that these same plaintiffs filed virtually identical claims in 88-C-809-E, before Judge Ellison of the Northern District of Oklahoma. The Court has reviewed that case file, being permitted to take judicial notice of its own records for summary judgment purposes. See St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1171-72 (10th Cir. 1979). Judge Ellison granted defendants' motion to dismiss in the prior litigation, and his Order was affirmed by the Tenth Circuit Court of Appeals on January 15, 1991. The affirmance was by unpublished Order and Judgment, but Rule 36.3 of the Tenth Circuit Rules permits use of an Order and Judgment to establish res judicata or collateral estoppel. The following definitional statement is helpful:

> The preclusive effects of prior adjudication are traditionally subsumed under the general doctrine of res judicata, used to refer to both claim preclusion and issue preclusion. Res judicata is sometimes used to refer only to the narrower concept of claim preclusion, as distinguished from issue preclusion, which is sometimes called collateral estoppel. To avoid confusion between the two referents of res judicata, we follow the Supreme Court in using the terms claim preclusion and issue preclusion.
>
> Carter V. City of Emporia, Kansas, 815 F.2d 617, 619 n.2 (10th Cir. 1987).

As defined by the Supreme Court, claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Issue preclusion, by contrast, refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75,

77 n.1 (1984). The application of these doctrines leads the Court to conclude that the adverse final ruling in the previous litigation is a bar to plaintiffs' present suit, both as to those defendants named in both lawsuits and those defendants named only in the present action.

It is the Order of the Court that the motion to dismiss, converted to motion for summary judgment, of defendants Oral Roberts, Richard Roberts, Oral Roberts Evangelical Association, Oral Roberts University, Clarence Boyd, Gary Gibson and Larry Johnson is hereby granted.

IT IS SO ORDERED this 13th day of July, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 7-15-93

FILED

JUL 15 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRISTOL RESOURCES CORPORATION, an Oklahoma corporation,

Plaintiff,

v.

SL ENERGY PARTNERS, L.P. a Delaware Limited Partnership, and TIERRA MINERAL DEVELOPMENT, L.C., a Texas limited liability company,

Defendants.

Case No. 93-C-0028 E

ORDER

The Court, having read the Stipulation and Application for Dismissal with Prejudice filed by Bristol Resources Corporation, and SL Energy Partners, L.P., and Tierra Mineral Development, L.C., (the "Defendants") and being advised of the premises therein, does hereby:

ORDER that any and all claims and counterclaims of Bristol Resources Corporation and the Defendants are dismissed with prejudice, with the Court retaining jurisdiction to enforce the parties' Settlement Agreement and with all parties to bear their own costs and attorneys' fees.

DATED this 15th day of July, 1993.

/s/ JAMES O. ELLISON

James O. Ellison
United States District Judge

062293C3 (1229.123/ljr lit#21)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TONY LYNN DAVIS,)
)
Petitioner,)
)
v.) 92-C-11-B
)
RON CHAMPION, et al,)
)
Respondent.)

ORDER

In 1984, two-year-old Eric Cole Harless ("Cole") died from what doctors described as a blunt injury to the abdomen. An 11-member jury convicted Petitioner Tony Davis ("Davis"), the boy's stepfather, of Second Degree Murder and Injury to a Minor Child.[1] Davis received a life sentence plus an additional 20 years. Subsequently, on January 6, 1992, Davis filed a 18 U.S.C. §2254 Petition For Writ Of Habeas Corpus.

On June 7, 1993, the Court held an evidentiary hearing pursuant to Rule 8 of the Rules Governing §2254 Habeas Cases.[2] The hearing focused on the following issue: **Did he (Tony Lynn Davis) consent to, authorize, or ratify his attorney's waiver of a 12-member jury?**[3] As discussed in the Court's March 16, 1993 Order, Lawrence Johnson, who represented Davis during the trial, waived his client's right to a 12-member jury. Davis argues that Johnson did so without his consent.

---

[1] *Donna Harless, the victim's mother, was convicted of Injury to a Minor Child and Manslaughter in the Second Degree. She received a $500 fine and three months in the county jail. Harless v. State, 759 P.2d 225 (Okl.Cr. 1988).*

[2] *The pertinent part of Rule 8(a) states: "If the petition is not dismissed at a previous stage in the proceeding, the judge...shall determine whether an evidentiary hearing is required."*

[3] *A March 16, 1993 Order denied Davis' remaining habeas claims (docket #13).*

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I. Evidence Submitted At The June 7, 1993 Evidentiary Hearing

Four persons testified at the hearing: **Lawrence Johnson, Davis, Sue Davis,** the petitioner's mother, and **Eddie Davis,** the petitioner's father. In addition, Davis submitted a copy of a certiorari brief written by Johnson on Davis' behalf to the United States Supreme Court.

Several facts are undisputed. Testimony at the trial established that Davis was a CPR instructor. Upon the close of evidence at Davis' trial, the 12-member jury began deliberations. During deliberations, juror James Allen Kennedy collapsed resulting in a cut on his forehead. The jury foreman then scrambled out of the deliberating room, yelling for Davis. Davis, with permission of the trial judge, hurdled the courtroom bar and rushed to Kennedy's side. Davis' mother, also trained in CPR, followed. The two of them revived Kennedy by slapping him on the back. He had apparently strangled on a mint. Kennedy was subsequently taken to a hospital.

Exactly what took place after Davis and his mother helped the juror is disputed. Johnson testified that the trial judge came up to him after the incident and offered him a mistrial. Johnson said he then went and spoke with Davis and his parents in the hallway about the judge's offer of a mistrial. He recalled the conversation:

> **Yes, I think he [Davis] understood, and I informed him of that, because that he had an obvious constitutional right that he had, and if he wanted a mistrial he could do it. I explained it would start all over. And we discussed the fact, well, you know, here a jury, the jury foreman, the first person they yelled for [Davis]...The foreman runs out yelling Tony, Tony -- not Judge or not somebody else or get a doctor, they were yelling for my client.** *Transcript at 9.*

Johnson said he told Davis that he believed deliberations should continue. Johnson's position was that, since the foreman had called for Davis to rescue Kennedy, chances for an acquittal seemed good. Johnson testified that Davis agreed with him. The attorney also testified that there was "no doubt" that Davis knowingly and intelligently waived his right to a 12-member jury. Johnson is an experienced trial lawyer in criminal litigation.

After Davis consented to the waiver, Johnson said he, Allen Smallwood and Tulsa County prosecutor Lucy Creekmore met in the judge's chambers.[4] The trial transcript shows such a meeting took place at 5:31 p.m. Below is an excerpt of that meeting:

> **I've indicated to all attorneys, and particularly to Mr. Johnson and Mr. Smallwood, that on a motion for mistrial at this particular point I think I'd be compelled to grant one, and I wouldn't feel uncomfortable in doing that. I would hate to have a seven-day trial result in a mistrial, but certainly if either one of the Defendants wants to so move, I won't have any hesitancy in granting a mistrial at this point, and I think they are aware of that.** Trial Transcript at 1254.

Johnson thereupon waived Davis' right to a 12-member jury. After the meeting, however, the judge did not question Davis on the record about the waiver. He did, however, announce in open court the attorneys' decision to continue with deliberations. Davis made no objections to the announcement. Afterward, jury deliberations continued and Davis was convicted.

Davis disputes Johnson's testimony. He testified that, after reviving the juror, he returned to the court hallway with his parents. He said he was called into court temporarily while the judge questioned the remaining 11 jurors. Davis then said the meeting in the judge's chambers took place.

---

[4] Smallwood represented Donna Harless.

Once that meeting was over, Davis testified that Johnson came into the hallway. Davis said Johnson "informed us [Davis and his parents] that the Judge had offered to grant a mistrial but that he [Johnson] declined that and...elected to go ahead with 11 jurors." *Hearing Transcript at 19.* In an exchange with Respondents' attorney, Davis also testified to the following:

> Q: There was no discussion at all. Okay. And you did not discuss this [the offer of a mistrial], according to your testimony, until after the waiver has been made?
>
> DAVIS: Yes, ma'am.
>
> Q. And did you accept at that time, or did you tell him you would not want to waive this at this time?
>
> DAVIS: The only comment I made was after he said that he elected to continue with 11 jurors, I stated 'I don't know, I believe they've convicted somebody already.' And at that time I didn't know that I had -- that I could even say anything about it, that it was my decision.
>
> Q: So did Mr. Johnson explain to you that the Court was willing to grant a mistrial or you could proceed with an 11-member jury?
>
> DAVIS: Not to me, no. He said that the Court had offered him a mistrial and that he neglected to take it.
>
> Q: So did you understand at all what that had meant?
>
> DAVIS: At that time, no. I do now. *Id. at 22.*

Davis added that he accepted the waiver, although he said he did not know he had a choice. Davis' parents essentially corroborated their son's testimony.

Davis submitted a certiorari brief written by Johnson on Davis' behalf. The brief argued that waiver to a 12-member jury should not have been allowed because the waiver took place in an in-chambers hearing out of Davis' presence. Certiorari was denied by the

United States Supreme Court.

II. Findings of Fact

After carefully examining the evidence, including testimony given at the evidentiary hearing, the findings of fact are as follows:

> **1. After Petitioner Davis and his mother helped revive the juror, the trial judge told Attorney Johnson and attorney Allen Smallwood in chambers on the record that he would grant a mistrial if either Davis so desired.**
>
> **2. Subsequent to the trial judge's offer, Johnson went to the hallway and told Davis that the trial judge was willing to grant a mistrial. Johnson briefly explained what a mistrial meant. Johnson also told Davis that he believed they should waive the right to a 12-person jury. Once Johnson had explained the options, Davis agreed to waive the right to a 12-person jury and proceed with the 11-person jury deliberations.**
>
> **3. After Johnson received Davis' consent, Johnson, Smallwood and Assistant District Attorney Lucy Creekmore met in the trial judge's chambers. In an exchange on the record, Johnson formally waived Davis' right to a 12-person jury as did the other parties.**
>
> **4. The trial judge did not question Davis in open court about the waiver. However, the judge did announce in open court that deliberations with the 11-member jury would continue as the parties had waived the 12-person requirement. Davis made no objection at that time.**

III. Legal Analysis

The right to a 12-person jury must be affirmatively waived by a defendant. *Patton v. United States,* 281 U.S. 276, 286, 50 S.Ct. 253, 74 L.Ed. 854 (1930).[5] Therefore, the pertinent question for the purposes of Davis' habeas claim is whether he knowingly and intelligently waived his right to a 12-person jury.

At least three ways exist for a Defendant to waive trial by jury: 1) The Defendant

[5] *The Court's earlier Order offers a more in-depth examination on this issue.*

personally waives trial by jury in open court and is questioned in open court by the trial judge[6]; 2) The Defendant and his counsel are in open court, counsel waives trial by jury and the Defendant does not object in open court.[7] The third way is explained below:

> **T]he final category of cases [occur] where counsel in open court and in the absence of the accused waives trial by jury on behalf of the accused. This situation may raise a presumption of a valid waiver and will be so held unless the accused presents evidence to show that he either did not authorize or consent to counsel's waiver or evidence that he did not ratify the waiver in any manner. If the defendant presents such evidence, then a rebuttable presumption arises that the defendant did not waive trial by jury. The State then can only rebut this presumption if the evidence from the record affirmatively and overwhelmingly shows the defendant consented, authorized or ratified counsel's waiver on his behalf.** *Hayes v. Oklahoma*, 541 P.2d 210, 211-212 (Okl.Cr. 1975).[8]

There is no question that the first category is the preferred method.[9] However, the circumstances in this case closely mirror the third category cited in *Hayes* as Defendant has presented the following evidence: Johnson timely informed Davis of the trial judge's offer of a mistrial. Johnson suggested that Davis waive his right to a 12-person jury. Davis consented to do so. Johnson then formally waived the right in a on-the-record meeting in the trial judge's chambers. In addition, Davis himself testified that he "accepted" the waiver without questioning it. *See Affidavit of Plaintiff. In open court the judge announced, on the record, the parties decision to proceed knowingly with the 11-person jury.* As a result, the

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[6] *See State v. Reid, 747 P.2d 560 (Ariz. 1987); Williams v. State, 325 A.2d 427 and State v. Allman, 573 P.2d 1329 (1977).*

[7] *See Vinston v. Lockhart, 850 F.2d 420 (8th Cir.1989); United States v. Reyes, 603 F.2d 69 (9th Cir.1979; United States v. Lane, 479 f.2d 1134 (6th Cir.) cert. denied, 414 U.S. 861, 94 S.Ct. 78, 38 L.Ed.2d 112 (1973 and United States v. Ricks, 475 F.2d 1326 (D.C.Cir. 1973).*

[8] *See United States v. State of Illinois, 619 F.2d 668 (7th Cir. 1980) and United States v. Spiegel, 604 F.2d 961 (5th Cir. 1979).*

[9] *The ABA Standards for Criminal Justice, Vol. 3, Ch. 15, Trial by Jury, Sec. 1.2(b) (1980) recommends: "The court shall not accept a waiver unless the defendant, after being advised by the court of his right to a trial by jury, personally waives his right to a trial by jury, either in writing or in open court for the record."*

Court finds that Davis consented to the waiver.

IV. Conclusion

After careful review of the evidence, including testimony given at the June 7, 1993 evidentiary hearing, the Court finds that Davis consented to his attorney's waiver of a 12-member jury. Therefore, Davis' habeas petition is dismissed.[10]

SO ORDERED THIS 13 day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[10] *The Court also finds that Davis' claim of ineffective assistance of counsel is without merit.*

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OPAL F. NADING,

Plaintiff,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendants.

92-C-518-B

ORDER

Now before the Court is Opal F. Nading's appeal of a decision that denied her Social Security benefits. Nading alleges disability since July 1, 1990 for a back impairment. For the reasons stated below, the Secretary's decision is affirmed.

I. Standard Of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).[1] The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).[2]

---

[1] *Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

[2] *Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. Trimiar v. Sullivan, No. 90-5249, slip op. at 6 (10th Cir. April*

The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If she shows that her disability precludes returning to her prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

II. Summary of Evidence/Procedural History

Plaintiff has filed three applications for Social Security benefits, two of which were earlier denied.[3] The focus of this appeal is the third application where Plaintiff alleged an onset date of July 1, 1990 for a back impairment and arthritis. *Transcript at 98.*

The Plaintiff, 5-foot-6, was 53 years old and weighed 208 pounds when she testified before the Administrative Law Judge ("ALJ"). She testified that she had a 10th grade education. Her past relevant work last took place in 1982 as an electrical assembly line worker. Plaintiff also testified that she served a 32-month prison sentence for assault and battery. *Tr. at 53.* She also admitted a past problem with alcohol. *Tr. at 66.*

Plaintiff testified that she had pain in her spine, shoulders and right hip. She testified that she had been receiving three cortisone treatments a week. The treatments, Plaintiff said, temporarily ease her pain. She testified that she has no side effects with her medications. *Tr. at 64.* Plaintiff also told the ALJ that doctors had placed no limitations on her physical activities with the exception of heavy lifting. *Tr. at 70.* She also said she has

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23, 1989).

[3] *Plaintiff initially filed an application for benefits on June 21, 1988, which was denied. Plaintiff did not appeal. Plaintiff filed a second application for benefits on February 3, 1989. That application was denied on April 17, 1989 without further appeal. Plaintiff's Brief at page 1. The ALJ determined that good cause did not exist to re-open either of those cases. Therefore, the Court will not do so. Nelson v. Secretary, 927 F.2d 1109, 1111 (10th Cir. 1990).*

depression. *Id.*

Plaintiff's sister, Caroline Lowe, also testified. She said that she sees Plaintiff three times a week. According to Ms. Lowe, Plaintiff's pain is so severe it prevents her from doing housework. Ms. Lowe also testified that her sister suffers from depression. *Tr. at 73-74.* Mary Ann Staudinger, Plaintiff's neighbor, offered similar testimony. *Tr. at 75-77.*

Dr. William Young, a vocational expert, also testified. In response to the ALJ's hypothetical questions, Dr. Young said that Plaintiff could return to her past work in electronic assembly.[4] Dr. Young also testified -- when questioned by Plaintiff's representative -- that, if Plaintiff's pain was as severe as she claimed, Plaintiff would not be able to handle such jobs. *Tr. at 75-84.*

Medical evidence submitted to the ALJ is as follows: On February 27, 1989, Dr. Kyle Stewart, a psychiatrist, examined Plaintiff.[5] He stated that she could follow instructions and could perform simple, repetitive tasks. Dr. Stewart also, however, added that "one might question her ability to withstand the stress and pressures associated with day-to-day work activity on the basis of both what appears to be mild to moderate levels

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[4] *The ALJ's hypothetical question stated: "Let's assume that the [ALJ] were to find that claimant is 53...has a 10th grade education with a limited ability to read, write and use numbers. Further assume that the [ALJ] were to find that the claimant has, in general, the physical capacity to perform...light and sedentary work. However, assume that the [ALJ] would find...the following physical limitations...the claimant would be limited to occasional stooping. The claimant would have gross and fine dexterity which would be normal, as is her grip strength within the limitations of light and/or sedentary. However, let's assume further that the ALJ might find certain functional or psychiatric limitations based upon a diagnosis of affective disorder, personality disorder and substance abuse in remission. In that regard the claimant could perform simple tasks with routine supervision. She could relate to co-workers and to supervisors for work purposes, would have trouble relating well with the public. Let's further assume that the claimant is afflicted with symptomatology, primarily mild to moderate to occasional chronic pain of sufficient severity as to be noticeable to her at all times, but that nonetheless she could be attentive to matters presented for handling and carrying out satisfactorily provided she remained at the light and/or sedentary level of exertion. Let's further assume...that the claimant does not take medication for the relief of symptomatology, but that with the utilization of the medication, and that considering along with her symptomatology and other posed restrictions she would not be precluded from functioning at the light and/or sedentary level, and that she would be able to remain reasonably alert and to perform functions, functions present in a work setting. Tr. at 80-81.*

[5] *The Secretary does not discuss Dr. Stewart's report because it took place prior to the denial of Plaintiff's second application (April 18, 1989.) Defendant's Response Brief at page 3. However, the ALJ stated that he examined some of the medical evidence submitted prior to April 18, 1989. Transcript at 17.*

of chronic depression and also chronic pain which may be independent of the depression or to some extent secondary to it." *Tr. at 293-294.*

On September 11, 1990, Dr. Dan Calhoun, a consulting physician, examined Plaintiff. Dr. Calhoun noted that she had "chronic low back pain...chronic lumbar strain plus probable degenerative joint and/or disc disease." *Tr. at 304.* The physician also mentioned that Plaintiff's weight of 246 pounds was "exogenous obesity" that aggravated her health problems. *Id.*[6]

On March 11, 1991, Dr. Mary E. Weare, a psychiatrist, examined Plaintiff's mental health. Her diagnosis was depression, NOS, and noted that Plaintiff's alcohol dependence was in remission.[7] Dr. Weare also stated that Plaintiff was "fully capable in handling her benefit funds in her own best interest." *Tr. at 330.* Plaintiff also was seen by Dr. R.E. Kaplan, M.D., at an outpatient pain clinic where she received epidural injections. She was discharged in good condition. *Tr. at 340.*

After evaluating the evidence, the ALJ found that Plaintiff had severe vocational impairments. However, he concluded that she could return to her past relevant work as an electrical assembly line worker, and, as a result, was not disabled. Plaintiff appealed that decision to the Court.

---

[6] *A MRI was conducted on Plaintiff on January 17, 1991. It showed "disc space narrowing and prominent arthritic changes...with some mild associate disc bulging but no disc herniation." Tr. at 321.*

[7] *Wrote Dr. Weare: "Mrs. Nading had normal motor activity and her stream of mental activity was spontaneous and logical. She was cooperative in the interview and seems motivated. She is using a 'day-to-day' existence. There was no evidence of hallucinations, delusions or looseness of association. Mood was depressed with a tearful effect. She admits to suicidal ideation and pent-up hostility, describing herself as having "a very bad temper." She is on a no-suicide contract with Grand Lake Mental Health Center. Her emotional reaction seemed depressed, but fairly appropriate." Tr. at 329.*

III. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in Appendix 1 of the relevant regulation;[8] (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. *20 C.F.R. § 404.1520(b)-(f) (1991).* If the Secretary finds the claimant disabled or not disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In the instant case, the ALJ's analysis stopped at step 4.

Plaintiff raises three issues: 1) The ALJ did not fully develop the record; 2) The ALJ did not properly evaluate her complaints of pain; and 3) The ALJ erred in asking hypothetical questions to the vocational expert.

The first issue is whether the ALJ adequately developed the record. Plaintiff specifically complains that the ALJ should have asked her sister and neighbor more in-depth questions about her pain.

An ALJ has a basic duty of inquiry so he can inform himself about facts relevant to his decision. *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th Cir. 1993). This duty to develop the record applies even if a claimant is represented by counsel. *Id.* Below is how a court examines whether the ALJ met such a duty:

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[8] *Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).*

> **The length or brevity of a benefits hearing, however, is not dispositive of whether or not the ALJ has met his or her obligation to adequately develop the record. The most important inquiry is whether...sufficient questions were asked [concerning] (1) the nature of a claimant's alleged impairments, (2) what on-going treatment and medication the claimant is receiving, and (3) the impact of the alleged impairment on a claimant's daily routine and activities.** *Id.*

In the case at bar, the ALJ met his duty to inquire. The record shows he asked sufficient questions concerning Plaintiff's alleged impairments, on-going treatment and the impact of the alleged impairments on Plaintiff's daily routine. He examined the medical evidence, listened to testimony from Plaintiff, Plaintiff's sister and Plaintiff's neighbor, in addition to the vocational expert. Such inquiry clearly informed him of the facts necessary to render his decision. Therefore, this issue is without merit.

The second issue is whether the ALJ properly evaluated Plaintiff's complaint of pain. The rule on evaluating complaints of pain is examined in *Luna v. Bowen*.[9] The ALJ must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id. at 163-164.* The court in *Luna* also explained what factors an ALJ must look at in examining a claimant's allegations of pain:

> **In previous cases, we have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness**

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[9] *834 F.2d 161 (10th Cir. 1987).*

> to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problem. [Other] factors for consideration [are] the claimant's daily activities, and the dosage, effectiveness and side effects of medication. *Id. at 166.*[10]

In the case at bar, the ALJ properly evaluated Plaintiff's pain. While he recognized that Plaintiff had "some degree of pain and comfort", he also noted that "mild to moderate pain is not, in itself, incompatible with the performance of sustained work activity." *Tr. at 30.* The ALJ further wrote:

> Claimant's treating physician, and the consultative examiners, have found no solid evidence or etiology concerning claimant's pain. Claimant does have some disk space narrowing and prominent arthritic changes at the L3-4 level. However, she has no herniated nucleus pulposus, and otherwise, she had a totally negative magnetic resonance imaging scan performed...The ALJ finds it significant that claimant, as of November of 1990, was on no medication for arthritis or pain in her back. At that time, claimant was also found in no significant distress. Despite the friendly testimony of claimant's sister and friend, and the two letters submitted by friends of claimant, there are no findings and no evidence to support that claimant is severely restricted by pain. *Tr. at 30.*

In his opinion, the ALJ also discussed the various doctors' medical findings, heard testimony concerning Plaintiff's pain and its impact on her daily activities. The ALJ discussed evidence concerning Plaintiff's functional restrictions. Such an analysis is not improper under the *Luna* analysis. Therefore, this issue, too, is without merit.

The third issue raised by Plaintiff is whether the ALJ's hypothetical question was improper. Along the same lines, Plaintiff also argues that the ALJ substituted his judgment instead of relying solely on the evidence before him. *Plaintiff's Brief at 3.*

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[10] *The Tenth Circuit noted that its list was not exhaustive. Luna, 834 F.2d at 166.*

Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, the ALJ is required to set forth only those physical and mental impairments in the hypothetical which are accepted as true by the ALJ. Sumpter v. Bowen, 703 F.Supp 1485 (D.Wyo. 1989).

The ALJ's hypothetical question is stated in footnote 4 of this Order. Plaintiff makes assorted arguments concerning the inadequacy of the hypothetical question. However, a review of the record shows that the ALJ's hypothetical was proper. He was not required to set forth every alleged impairment of the Plaintiff, only the ones he deemed to be credible.[11]

IV. Conclusion

The ALJ found that Plaintiff could return to her past relevant work. Plaintiff challenges that decision, claiming she is disabled and should be granted benefits. After examining the issues raised by Plaintiff, the Court finds that substantial evidence does support the Secretary's findings. Consequently, the Secretary's decision is **AFFIRMED.**

SO ORDERED THIS 14 day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[11] *Plaintiff asserts that the ALJ -- when questioning the vocational expert -- ignored the findings of Dr. Scott D. Cochran, who noted on November 16, 1990, that Plaintiff had a laceration on her right arm and numbness in three fingers. Tr. at 18. However, given the fact that Dr. Calhoun found that Plaintiff's grip strength and gross and fine dexterity were normal and that Plaintiff could manipulate objects with her hands and fingers without difficulty. Tr. at 303-304. Under those circumstances, the undersigned does not find that the ALJ erred in his hypothetical question.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN C. TENNISON and JUDITH TENNISON,

Plaintiffs,

vs.

GALLAGHER-PLUMER, LTD., RIVER THAMES INSURANCE CO., LTD., and UNIONAMERICA INSURANCE CO., LTD.,

Defendants.

Case No. 93-C-288B

ORDER

Based upon the Stipulation and Request for Dismissal with Prejudice, submitted by the Plaintiffs, John C. Tennison and Judith Tennison and Defendants River Thames Insurance Co., Ltd. and UnionAmerica Insurance Co., Ltd., pursuant to Fed. R. Civ. P. 41(a)(2),

IT IS HEREBY ORDERED, that the above action is dismissed with prejudice to the refiling thereof with each of the above parties to bear their own costs and attorneys fees.

Thomas R. Brett
United States District Judge

ENTERED ON DOCKET

DATE 7-15-93

FILED

JUL 14 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAMS GAS MARKETING COMPANY, Plaintiff,	)	
v.	)	Case No. 93-C-378 B
SIGNAL FUELS TRADING CORP., Defendant.	)	

JUDGMENT

Judgment is hereby entered in favor of the Plaintiff WILLIAMS GAS MARKETING COMPANY and against the Defendant SIGNAL FUELS TRADING CORP. in the amount of $589,437.65, with post-judgment interest thereon at the rate of 3.54% per annum until paid, and with such costs and attorneys fees as may be taxed herein.

Dated: ~~June~~ July 14, 1993.

Honorable Thomas R. Brett
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, Plaintiff, -vs.- THOMAS W. CUMMINGS; JANICE S. CUMMINGS; CITY OF OWASSO, OKLAHOMA; AVCO FINANCIAL SERVICES OF OKLAHOMA, INC.; THE STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; Defendants.	)	CASE NO. 93-C-390 E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 14 day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, Thomas W. Cummings, appears not, but makes default; the defendant, Janice S. Cummings, appears not, but makes default; the defendant, City of Owasso, Oklahoma, appears not, having previously filed its disclaimer of any interest in or to the Property; the defendant, AVCO Financial Services of Oklahoma, Inc., appears not, but makes default; the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission appears by Kim D. Ashley, Assistant General Counsel; and the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County,

Oklahoma, appear by J. Dennis Semler, Assistant District Attorney.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, **Thomas W. Cummings**, acknowledged receipt of summons and complaint on May 13, 1993, but has failed to otherwise appear and is in default;

(b) the defendant, **Janice S. Cummings**, acknowledged receipt of summons and complaint on May 13, 1993, but has failed to otherwise appear and is in default;

(c) the defendant, **AVCO Financial Services of Oklahoma, Inc.**, was served a summons and complaint by certified mail, return receipt requested, delivery restricted to the addressee, United States Corporation Company, their registered agent for service of process, on May 7, 1993, but has failed to otherwise appear and is in default;

(d) the defendant **City of Owasso, Oklahoma**, entered its appearance in this case and filed a disclaimer of any interest in or to the Property on June 3, 1993; and

(e) all other defendants, namely **The State of Oklahoma, ex rel. Oklahoma Tax Commission; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have filed timely answers and have approved the form of this judgment as evidenced by their subscription.

2. This court has jurisdiction pursuant to 28 U.S.C. 1345 because the United States is the plaintiff; and venue is

proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On July 31, 1978, Thomas W. Cummings and Janice S. Cummings, husband and wife, executed and delivered to The Lomas & Nettleton Company, a mortgage note in the amount of $37,450.00, payable in monthly installments, with interest thereon at the rate of nine and one half (9.5%) percent per annum.

4. As security for the payment of the above described mortgage note, Thomas W. Cummings and Janice S. Cummings, husband and wife, executed and delivered to The Lomas & Nettleton Company, a mortgage dated July 31, 1978, covering the following described property:

> Lot Seven (7), Block Four (4), HILLSIDE ESTATES, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk August 15, 1978, in book 4346 at page 2668. The mortgage tax due thereon was paid.

5. (a) On May 30, 1986, The Lomas & Nettleton Company, a corporation assigned the mortgage note and the mortgage securing it to Carteret Savings Bank, F.A., by an instrument recorded with the Tulsa County Clerk September 2, 1986, in book 4966 at page 2971.

(b) On May 11, 1990, Carteret Savings Bank, F.A. assigned the mortgage note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by an instrument recorded with the Tulsa County Clerk July 17, 1990, in book 5265 at page 57.

6. On March 1, 1990, the defendants, Thomas W. Cummings and Janice S. Cummings, entered into an agreement with the plaintiff lowering the amount of the monthly installments due in exchange for the plaintiff's forbearance of its right to foreclose due to such defendants' default in paying the installments. A superseding agreement between these parties was reached on February 1, 1991.

7. The defendants, Thomas W. Cummings and Janice S. Cummings, have defaulted under the terms of the note, mortgage and forbearance agreements due to their failure to pay installments when due and due to their abandonment of the Property. Because of such default, the defendants, Thomas W. Cummings and Janice S. Cummings, are indebted to the plaintiff in the amount of $46,575.09, plus interest at the rate of nine and one-half percent per annum from January 1, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of $341.00 for abstracting and $8.00 for recording the Notice of Lis Pendens.

8. The defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission has a lien on the Property by virtue of tax warrants in the aggregate amount of $1,171.45, plus penalties and interest. Warrant number ITI9202174000 in the amount of $986.92 was perfected December 9, 1992; and warrant number ITI9300808000 in the amount of $184.53 was perfected April 14, 1993.

9. The defendant, AVCO Financial Services of Oklahoma, Inc., has no right, title or interest in the Property.

10. The defendant, City of Owasso, Oklahoma, has no right, title or interest in the Property.

11. The defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title or interest in the Property.

12. Pursuant to 12 U.S.C. 1710(l) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED that the plaintiff have and recover judgment against the defendants, Thomas W. Cummings and Janice S. Cummings, in the principal sum of $46,575.09, plus interest at the rate of nine and one-half percent per annum from January 1, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of $349.00, plus any additional sums

advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED that the defendant, State of Oklahoma, ex rel., Oklahoma Tax Commission, have and recover judgment in the amount of $1,171.45, plus penalties and interest.

IT IS FURTHER ORDERED that the defendant AVCO Financial Services of Oklahoma, Inc.; the defendant, City of Owasso, Oklahoma; the defendant, County Treasurer, Tulsa County, Oklahoma; and the defendant, Board of County Commissioners, Tulsa County, Oklahoma, have no right, title or interest in the Property.

IT IS FURTHER ORDERED that upon the failure of the defendants, Thomas W. Cummings and Janice S. Cummings, to satisfy the money judgment of the plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the Property, according to the plaintiff's election with or without appraisement and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

Second:

In payment of the judgment rendered herein in favor of the plaintiff;

Third:

In payment of the judgment rendered herein in favor of the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission.

Fourth:

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED that after the sale of the Property by virtue of this judgment and decree, all of the defendants and all persons claiming under them be forever barred of any right, title, interest or claim in or to the Property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

Judgment of Foreclosure
USA vs. Thomas Cummings
Civil Action No. 93-C-390 E

APPROVED:

F. L. DUNN, III
United States Attorney

Mikel K. Anderson
Special Assistant United States Attorney
U.S. Dept. of Housing & Urban Development
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

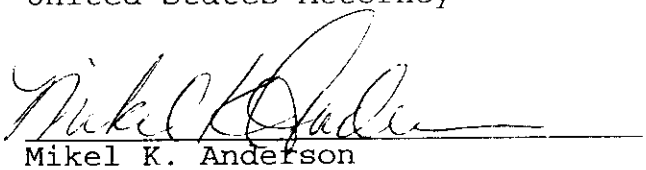
Kim D. Ashley
Assistant General Counsel
Attorney for defendant
State of Oklahoma, ex rel
Oklahoma Tax Commission

J. Dennis Semler
Assistant District Attorney
Attorney for defendants
County Treasurer and
Board of County Commissioners
Tulsa County, Oklahoma

Judgment of Foreclosure
USA vs. Thomas Cummings
Civil Action No. 93-C-390 E

APPROVED:

F. L. DUNN, III
United States Attorney



Mikel K. Anderson
Special Assistant United States Attorney
U.S. Dept. of Housing & Urban Development
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Kim D. Ashley
Assistant General Counsel
Attorney for defendant
State of Oklahoma, ex rel
Oklahoma Tax Commission

J. Dennis Semler
Assistant District Attorney
Attorney for defendants
County Treasurer and
Board of County Commissioners
Tulsa County, Oklahoma

ENTERED ON DOCKET
DATE 7-14-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRISTOL RESOURCES CORPORATION, an Oklahoma corporation,

Plaintiff,

v.

SL ENERGY PARTNERS, L.P. a Delaware Limited Partnership, and TIERRA MINERAL DEVELOPMENT, L.C., a Texas limited liability company, STANFORD OFFSHORE, INC., a Texas corporation, and STANFORD PETRO, INC., a Texas corporation,

Defendants.

Case No. 93-C-0192 E

FILED

JUL 14 1993

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

The Court, having read the Stipulation and Application for Dismissal with Prejudice filed by Bristol Resources Corporation and SL Energy Partners, L.P., Tierra Mineral Development, L.C., Stanford Offshore, Inc., and Stanford Petro, Inc., (the "Defendants") and being advised of the premises therein, does hereby:

ORDER that any and all claims and counterclaims of Bristol Resources Corporation and the Defendants are dismissed with prejudice, with the Court retaining jurisdiction to enforce the parties' Settlement Agreement and with all parties to bear their own costs and attorneys' fees.

DATED this 14 day of June, 1993.

JAMES O. ELLISON

James O. Ellison
United States District Judge

062293C4 (1229.129/ljr lit#21)

ENTERED ON DOCKET

DATE 7-14-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE CO.,

Plaintiff,

vs.

MOORE'S FUNERAL HOME, INC., et al.,

Defendants.

No. 92-C-155-E

ORDER AND JUDGMENT

The Court has before it several pending motions. Because Plaintiff's Motion for Summary Judgment (docket #23) is dispositive; the remaining motions of the parties are denied as moot.

The court has reviewed the record in light of the applicable law and finds that under the terms of the insurance policy at issue no coverage is provided for acts alleged in actions instituted against Mr. Pricer nor is Plaintiff liable to provide either defense for him or any claim for contribution by Moore's Funeral Home.

Therefore, Plaintiff is entitled to the Declaratory Judgment it seeks; its Motion for Summary Judgment is granted and this case is hereby dismissed.

ORDERED this 14th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CURRAN & ASSOCIATES,

Plaintiff,

vs.

GREAT LAKES GAS TRANSMISSION LIMITED PARTNERSHIP, et al.,

Defendants.

No. 92-C-738-E

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the record and finds that this action has been resolved. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 14th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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ENTERED ON DOCKET

DATE 7-14-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DYKON, INC.,

Plaintiff,

vs.

AMERICAN TRUST INSURANCE COMPANY, LTD., et al.,

Defendants.

No. 92-C-999-E

ADMINISTRATIVE CLOSING ORDER

The Plaintiff having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 14th day of July, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DiCESARE,)
)
Plaintiff,)
)
vs.) No. 92-C-905-C
)
STANLEY GLANZ, et al.,)
)
Defendants.)

ORDER

IT IS HEREBY ORDERED that:

1. Plaintiff's motion for appointment of counsel (#2) is denied;
2. Defendants' motion to allow submission of special report and to adopt the special report and brief in support of summary judgment filed in case number 92-C-269-B (#3) is granted. The court notes that Plaintiff admits in the instant complaint that he raised the same issues here as in 92-C-269-B;
3. Defendants' motion to consolidate (#4) is denied as moot;
4. Plaintiff's motion to compel (#6) is denied;
5. Plaintiff's motion not to consolidate this case with 92-C-269-B (#7) is denied as moot;
6. Plaintiff's motion to stay the district court's ruling on Defendants' motion for summary judgment until Plaintiff has achieved adequate discovery in this case with combined motion for the district court to exclude and/or

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strike the Martinez report submitted in Defendants' motion for summary judgment (10) is denied;

7. Plaintiff's reasserted motion to compel with sanctions imposed (#11) is denied;

8. Defendants' motion to dismiss/motion for summary judgment (#5) is granted, and this action is dismissed (see record in 92-C-269-B, attached order).

SO ORDERED THIS 13th day of June, 1993.

H. DALE COOK
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE TIMBERS HOMEOWNERS ASSOCIATION)
)
Plaintiff)
)
vs.) Case No. 92-C-01040-B
)
RESOLUTION TRUST CORPORATION,)
as Successor-in-interest to)
SOONER FEDERAL SAVINGS AND)
LOAN ASSOCIATION,)
)
Defendant)

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, THE TIMBERS HOMEOWNERS ASSOCIATION, by and through their attorney, JEFFREY D. LOWER of ROBERT E. PARKER AND ASSOCIATES, and hereby dismisses the above action with prejudice.

JEFFREY D. LOWER OBA #11909
ROBERT E. PARKER AND ASSOCIATES
2431 East 61st Street, Suite 100
Tulsa, Oklahoma 74136
(918) 745-0792

Attorney for Plaintiff,
The Timbers Homeowners Association

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 13th day of July, 1993, he forwarded a true and correct copy of the above and foregoing document by first-class mail, postage prepaid to the following party:

Caroline B. Benediktson
Barry K. Beasley
Julie Hird Thomas
Huffman, Arrington, Kihle
Gaberino & Dunn, P.C.
100 W. 5th Street, Ste. 1000
Tulsa, OK 74103-4219

Jeffrey D. Lower

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DANNYE E. ARMSTRONG,	)	
	)	
Petitioner,	)	
	)	
v.	)	92-C-670-B
	)	
DAN REYNOLDS,	)	
	)	
Respondent.	)	

ORDER

This order pertains to petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket #1)[1] and respondent's Response to Petition for Writ of Habeas Corpus (#3). Petitioner was convicted in Tulsa County District Court, Case No. CRF-88-4293 of attempted first degree burglary and second degree burglary and sentenced to twenty-five (25) years and fifty (50) years imprisonment.

The conviction was affirmed on appeal to the Oklahoma Court of Criminal Appeals on October 23, 1991, in Case No. F-89-627. The petitioner has exhausted his state court remedies for the purposes of federal habeas corpus review.

The petitioner has named the Attorney General of the State of Oklahoma as a respondent in this federal habeas corpus action. Under Rule 2(a) of the Rules Governing Section 2254 Cases, the state officer having custody of the applicant should be named as a respondent. When a habeas corpus petitioner seeks relief from state custody, he must direct his petition against those state officials holding him in restraint. Moore v. United States, 339 F.2d 448 (10th Cir. 1964).

---

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

In Spradling v. Maynard, 527 F. Supp. 398, 404 (1981), the court held that the Attorney General of the State of Oklahoma is not a proper party respondent in a habeas corpus action brought by a state prisoner already in custody. The court stated:

> The Attorney General of Oklahoma is simply legal counsel for the Oklahoma Department of Corrections and its employees. He is not the custodian of any prisoner incarcerated in any Oklahoma correctional institution. In the circumstances, he could not respond to a writ of habeas corpus on behalf of a prisoner even if one was issued to him.

Id.

The Court is aware that the model form for use by petitioners making § 2254 habeas corpus applications includes the state attorney general as an additional respondent. The Attorney General of Oklahoma, as legal counsel for the Oklahoma Department of Corrections and its employees, benefits by receiving immediate notice of a habeas corpus petition. However, the Court concludes that respondents' request for dismissal of the Attorney General of Oklahoma as a party respondent should be granted pursuant to Rule 2(a).

The petitioner now seeks federal habeas relief on the alleged grounds that: (1) the verdicts were founded on insufficient evidence; (2) the trial court erred in giving a jury instruction on the defendant's departure or flight; and (3) prosecutorial misconduct denied petitioner a fair trial.

There is no merit to petitioner's claim that the verdicts were founded on insufficient evidence.

In his first claim, petitioner alleges that the verdicts against him were founded on insufficient evidence. A state prisoner is not entitled to federal habeas relief unless he

demonstrates state court errors that deprived him of fundamental rights guaranteed by the United States Constitution. Brinlee v. Crisp, 608 F.2d 839 (10th Cir. 1979), cert. den. 444 U.S. 1047 (1980).

The petitioner argues that, because there was no property damage present, the specific intent requirement for Count I was not met. In United States v. White, 557 F.2d 233, 236 (10th Cir. 1977), the court emphasized that the issue of specific intent is a factual question seldom proved by direct evidence. Intent may be inferred from the conduct of the defendant and the facts and circumstances surrounding the case which tend to show mental attitude and on which reasonable inferences may be based. Id.

The Oklahoma Court of Criminal Appeals has held that it is proper for a jury to use circumstantial evidence to prove the offense of attempted burglary. Greer v. State, 763 P.2d 106, 108 (Okla.Crim.App. 1988). When circumstantial evidence is used, the "reasonable hypothesis" test is the proper standard for reviewing a verdict based solely upon circumstantial evidence. Id. at 107. This test requires only that the state's evidence exclude every reasonable hypothesis other than guilt. Under the "reasonable hypothesis" test, this court cannot find a reasonable hypothesis other than guilt. In the present case, the resident of the home testified that she saw the petitioner attempting to break in with a screwdriver-like object, and he left only when he was surprised by her at the kitchen window. (Trial Transcript ("TR") 43-45). The evidence in this case was sufficient to establish that the petitioner possessed the requisite intent.

The petitioner raises the same claim as to his conviction for burglary in the second degree. He alleges that the elements of burglary were not proven, because the state's

evidence failed to show his intent to steal personal property. The trial transcript reveals that the home in question showed clear signs of forced entry. Several pillow cases filled with the homeowner's belongings were found inside. (TR 29). A police officer also witnessed the petitioner exiting out a window of the home. (TR 26). The evidence in this case was sufficient to support the conviction of second degree burglary. This claim must also fail.

There is no merit to petitioner's jury instructions claim.

In his second claim petitioner alleges that improper jury instructions were given. Habeas corpus is not available to set aside a conviction on the basis of an erroneous jury instruction unless the error has such an effect on the trial that it is rendered fundamentally unfair, 608 F.2d at 850, or there is a complete failure to instruct on an essential element of an offense. Rael v. Sullivan, 918 F.2d 874, 875 (10th Cir. 1990), cert. den. 111 S.Ct. 1328 (1991). Under Oklahoma law, instructing a jury on flight is proper when there is evidence in the record to support such an instruction. Scott v. State, 751 P.2d 758, 760 (Okla.Crim.App. 1988), cert. denied, 490 U.S. 1114 (1989). Also, the court in Farrar v. State, 505 P.2d 1355, 1361 (Okla.Crim. App. 1973), held that "flight" is a circumstance that the jury may consider in determining the guilt or innocence of the accused.

In the present case, there is ample evidence of flight. A police officer testified that, when the petitioner crawled out of the house through a window, he attempted to flee after hearing the officer's command to freeze. (TR 19-20). Another officer testified that the petitioner came running from the direction of the burglarized home with the first patrolman in pursuit. (TR 60). The transcript reveals that three separate demands had

to be made for the petitioner to stop before his eventual capture. (TR 61). There is no merit to this claim.

There is no merit to petitioner's prosecutorial misconduct claim.

In his third claim petitioner alleges that the prosecutor was guilty of misconduct in his "actions, questions, and comments", thus denying him a fair trial. The Supreme Court has ruled that, to constitute a due process violation, prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." United States v. Bagley, 473 U.S. 667, 676 (1985) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)).

The trial transcript shows that Mr. A. J. Shultz, the assistant district attorney asked: "You don't have any respect for the law or the police, do you?" (TR 74), "Isn't it a fact you would say anything to keep from going back to prison?" (TR 77), and other questions inferring that petitioner was not being truthful (TR 75-80). The district attorney also questioned the petitioner regarding his most recent conviction for second degree burglary and asked: "Two-time convicted felon and you're on house arrest. Why should these ladies and gentlemen of the jury believe you and not believe Officer Maras?" (TR 78). He then commented: "You didn't learn anything, did you?" after asking about earlier burglary and larceny convictions (TR 79).

In his closing argument, the assistant district attorney also attempted to evoke sympathy for the victim of the attempted burglary by comments such as: "She looks out her back window and she saw that man's face right there at the back window. Now, that's a pretty shocking experience, something you don't forget. You don't forget something like

that." (TR 86) and "Think about what a 17 year-old girl would feel -- how a 17 year-old girl would feel about something happening in the morning in that situation. Someone is turning the door knob trying to get in. She doesn't know who's there. She can't see who'se [sic] there." (TR 85-86). He also suggested that, had the victim not gotten a knife and "hollered at him, we don't know what would have happened." (Tr 87). He told the jury that the case was "straight forward" and "simple" (TR 90 & 92). He commented that "There's no question about what his intent was, there's no questions about his intent to commit a crime, there's no question about identification. He's the man seen coming out of the house." (TR 90).

The district attorney also commented that: "... you have to disbelieve all the evidence if you believe what that defendant testified. You had a chance to observe him, watch him sit up there and wiggle around and squirm." (TR 92). Then he said: "The only credibility his testimony has had in this courtroom is to give you an idea of what a habitual criminal is like. I say habitual criminal because that's what he is. His prior convictions show you that, his actions show you that, the evidence in this case has proved that beyond any doubt, let alone reasonable doubt. Would ask [sic] based upon the evidence, based upon the law, do your duty as a jury and return a verdict of guilty...." (TR 92).

The district attorney argued: "He's made a past decisions [sic]. He's been convicted twice of similar crimes. He made the decision to attempt to burglarize Carolyn Henderson's house. It's time to pay for that." (TR 106). He went on to say: "... he hasn't learned, hasn't learned anything from September, 1987, he was up here last time and got fined to October, 1988 making the same decisions while he was on house arrest ...." (TR 106).

These comments were clearly unnecessary and argumentative. It was improper to evoke sympathy for the victim, to attempt to arouse the jury, and to interject personal comments concerning the truth or falsity of testimony and the guilt or innocence of the defendant. However, not all improper comments require a new trial; it is only when a remark could have influenced the jury's verdict that there is reversible error. United States v. Kendall, 766 F.2d 1426, 1440 (10th Cir. 1985), cert. denied, 474 U.S. 1081 (1986). The evidence of guilt was so overwhelming that any prosecutorial misconduct was not verdict determinative.

The petitioner has not demonstrated any court error that deprived him of his fundamental rights guaranteed to him by the United States Constitution. Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 12th day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 7-13-93

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUL 13 1993

Richard M. Lawrence
U.S. District Court
Northern District of Oklahoma

ERVIN W. HAWKINS, JR.,

Plaintiff,

vs.

RON CHAMPION, et al,

Defendants.

No. 92-C -305-E

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed January 7, 1993 (docket #26). After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby is adopted by the Court.

IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate (docket #26) is hereby **AFFIRMED**.

ORDERED this 13th day of July, 1993.

James O. Ellison

CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH HAROLD GOURLEY,)
)
Petitioner,)
)
v.) 92-C-689-E
)
BOBBY BOONE, Warden,)
)
Respondent.)

ORDER

This order pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1)[1], Respondent's Response to Petition for Writ of Habeas Corpus (Docket #6), and the Reply to the Attorney General's Response to Petitioner's Application for Habeas Corpus (Docket #7). Petitioner was convicted in Tulsa County District Court, Case No. CRF-86-3794, of possession of a sawed off shotgun and assault with a dangerous weapon after former conviction of two or more felonies and sentenced to forty years on each count.

The petitioner appealed his convictions to the Oklahoma Court of Criminal Appeals in Case No. F-87-501. The convictions were affirmed with the sentences modified to thirty years on each count because of prosecutorial misconduct. Petitioner filed an application for post-conviction relief in Tulsa County District Court which was denied. He appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals in Case No. PC-91-801, and the denial was affirmed.

Petitioner now seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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the following alleged grounds: that the trial court erred by not giving an instruction on defense of another, that his sentences were excessive due to prosecutorial misconduct, that the trial court erred by not giving an instruction on unenhanced punishment, and that he was denied a fair trial because a material witness was unavailable due to the actions of the state.

Respondent contends that the alleged error of failing to issue a jury instruction on defense of another does not rise to the constitutional level for relief in a federal habeas corpus proceeding. Respondent also argues that the Oklahoma Court of Criminal Appeals' modification of petitioner's sentence to thirty years on each count was sufficient to cure any error due to alleged prosecutorial misconduct. Respondent claims that the petitioner was not denied a fair trial because an instruction on unenhanced punishment was not given. Respondent contends that the absence of a witness at trial cannot be attributed to the state because the petitioner did not attempt to subpoena the witness; furthermore the witness' testimony would have been cumulative.

Petitioner's Claim of Error Regarding Failure to Instruct on Defense of Another Has No Merit

Petitioner asserts that the trial court erred by not instructing the jury on the law concerning defense of another. Habeas corpus proceedings are not the proper forum for setting aside convictions based upon erroneous jury instructions unless use of the challenged instruction denied petitioner a fundamentally fair trial. Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). The petitioner has been deprived of a fundamentally fair trial if there is a reasonable probability that, in the

absence of the improper ruling, the outcome of the trial would have been different. Tucker v. Kemp, 802 F.2d 1293, 1295-1296 (11th Cir. 1986), cert. denied, 480 U.S. 911 (1987).

According to Oklahoma law, a defendant is entitled to an instruction on his theory of defense only if it is supported by the record. Hopper v. State, 736 P.2d 538, 541 (Okla. Crim.App. 1987). There is no evidence to support petitioner's claim that he was defending another person. At his sentencing, Petitioner testified that a woman friend came to his motel room, saying she was frightened because two "junkies" had come to the room she shared with a friend "demanding to buy dope" and had dumped her purse upside down and frightened them (Transcript of Proceedings and Formal Sentencing, Jan. 5-7, 1987 ("TR"), pg. 113). She asked him to "run them off before they hurt us." (TR 113). Petitioner testified that he had no intention of robbing the junkies, but was only going to "try to get them to leave before they hurt somebody." (TR 113). He took a shotgun, put it under his coat, and pulled it out when he got to the motel room where the "junkies" were, so "they would go on and leave like most junkies would." (TR 113-114). He claimed he only held the gun in the air (TR 114), but the two undercover police officers posing as "junkies" in the room testified he entered and immediately hit Officer Hondros in the face with the gun and struggled with the officers, although they shouted that they were police officers (TR 16-18). There was no reason for petitioner to assume that the other woman in the room was about to be injured based on the claim that the "junkies" had dumped a purse and demanded drugs.

Additionally, Okla.Stat. tit. 22, § 33 provides: "Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."

(emphasis added). Even if the petitioner had reason to believe the other girl was in imminent danger, his actions were clearly unreasonable in light of the evidence presented. Whitechurch v. State, 657 P.2d 654, 656-657 (Okla.Crim.App. 1983). Therefore, there is no merit to this claim.

Petitioner's Claim That The Sentences Are Excessive Is Without Merit

Petitioner asserts that due to prosecutorial misconduct, the forty year sentences he received on each count was excessive and should be modified to the minimum or a new trial granted.

Habeas corpus relief is available for prosecutorial misconduct only when the conduct is so egregious that it renders the trial so fundamentally unfair as to deny due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986). The Supreme Court has ruled that, to constitute a due process violation, prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." United States v. Bagley, 473 U.S. 667, 676 (1985) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)). In the present case, the Oklahoma Court of Criminal Appeals found certain actions of the prosecutor warranted a modification of petitioner's conviction to 30 years on each count. The prosecutor erred in questioning petitioner regarding prior convictions that were over ten years old (TR 140), by questioning him about the amount of time he served for prior convictions (TR 116), and by characterizing him as a "career criminal" (TR 143) who should receive "2000 years" (TR 218) from a jury sending "a message" to him. (TR 219-220, 241-242). However, this court finds, as did the Oklahoma Court of Criminal

Appeals in Gourley v. State, 777 P.2d 1345, 1349 (Okla. Crim. App. 1989), that the strong evidence of petitioner's guilt made any prosecutorial misconduct not verdict determinative. Not all improper comments require a new trial; it is only when a remark could have influenced the jury's verdict that there is reversible error. United States v. Kendall, 766 F.2d 1426, 1440 (10th Cir. 1985), cert. denied, 474 U.S. 1081 (1986). The modification by the appeals court remedied any errors caused by prosecutorial misconduct and habeas corpus relief is not warranted.

Petitioner's Claim of Denial of Due Process By the Lack of A Jury Instruction On Unenhanced Punishment Has no Merit

Petitioner asserts that the trial court erred in refusing to give his requested instructions on unenhanced punishment regarding his former felony convictions. As already discussed, under Brinlee v. Crisp, a question regarding jury instructions is not cognizable in a federal habeas corpus proceeding unless the error deprived the petitioner of a constitutionally fair trial. 608 F.2d at 850. In the present case, petitioner was not denied a fair trial.

Petitioner admitted under oath that he had prior convictions for two or more felonies. (TR 116). Under Oklahoma law, when a defendant confesses to his former convictions under oath, there is no factual question for the jury's determination. Hanson v. State, 716 P.2d 688, 690 (Okla.Crim.App. 1986). Because petitioner admitted his prior convictions, the jury could only come to one conclusion, that the petitioner had prior felony convictions. Therefore an instruction on unenhanced punishment was not required and petitioner was not deprived of a fundamentally fair trial.

Petitioner's Claim That He Was Denied Due Process Because The State Deprived Him Of A Witness Is Without Merit

Petitioner asserts that Pangy Goodson, an alleged material witness, refused to testify on behalf of the defendant because the state filed two drug charges against her two weeks before the petitioner's trial. Because she did not testify, the petitioner claims that he was not given a fair trial where he could adequately raise his defenses.

It is well settled that an accused is entitled to have compulsory process for obtaining witnesses in his favor. U.S. Constitution Amend. XI. This right is a part of the due process clause of the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 17-18 (1967). To require a witness to appear before the court, a subpoena must be issued. Okla. Stat. tit. 22, § 703. Disobedience to a subpoena or a refusal to testify may be punished by the court as criminal contempt. Okla. Stat. tit. 22, § 716.

In the present case, Petitioner never asked that a subpoena issue to Ms. Goodson. He claims that it would have been useless, because Ms. Goodson said that she would not testify because of the charges filed against her. However, she was capable of testifying. Once she got on the witness stand, she could have invoked the right against self-incrimination. Roussell v. Jeane, 842 F.2d 1512, 1516 (5th Cir. 1988). The state is not compelled to grant immunity to a potential defense witness to get him/her to testify. United States v. Paris, 827 F.2d 395, 399 (9th Cir. 1987). Therefore, Ms. Goodson made the choice not to testify and the state cannot be said to have denied petitioner due process.

Additionally, any testimony Ms. Goodson would have given would have merely been cumulative. Charlotte Renee Wagner, who was present when Ms. Goodson entered petitioner's motel room, testified as to what happened that evening (TR 152-162).

Petitioner was not prejudiced by Ms. Goodson's refusal to testify. There is no merit to this claim.

Conclusion

The court finds that all of petitioner's claims for habeas corpus relief are meritless.

Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) is dismissed.

Dated this 12th day of July, 1993.

~~THOMAS R. BRETT~~ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FIGGIE ACCEPTANCE CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-0540-B
	)	
ABATEMENT SYSTEMS, INC.,	)	
	)	
Defendant.	)	

ORDER

The United States Bankruptcy Court for the Northern District of Oklahoma subordinated a mortgage claim of Appellant Figgie Acceptance Corporation ("Figgie") to a mechanic's lien held by Appellee Abatement Systems Inc. ("ASI"). Figgie now appeals that decision, arguing that the Bankruptcy Court improperly applied the doctrine of equitable subordination under 11 U.S.C. §510(c).

I. A Summary of the Facts and Procedural History

The events leading up to this appeal began on July 7, 1989 when Figgie loaned 5000 Skelly Corporation ("Skelly") $6.5 million. Figgie took a mortgage on the hotel property to secure its loan.Of the $6.5 million, Skelly used $3.5 million to buy a Tulsa hotel called Park Plaza.

Of the remaining $3 million, $1.5 million was for asbestos abatement. Figgie and Skelly entered into a loan agreement where Figgie agreed to make periodic advancements

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for the asbestos removal and other renovations as the work was done.[1]

On October 4, 1989, a meeting was held to discuss the asbestos removal and renovation. The following persons attended the meeting: Stephen P. Wood, a Figgie marketing representative who was in charge of the construction project; Steve Fulps, a co-owner of ASI; William Smith, Skelly's principal owner; Ron Looney, Skelly's on-the-job manager; and Neil Block, a Houston, Texas construction consultant who was Figgie's on-site construction supervisor. Among the items discussed were: 1) Figgie insisted that the asbestos be removed completely; 2) Figgie required third-party inspection of ASI's work; 3) ASI had to provide liability insurance in case someone was injured during asbestos removal; and 4) ASI had to provide a performance bond.

During the meeting, Fulps asked for a payment bond from Figgie guaranteeing payment to ASI if Skelly failed to pay. Wood and Block told Fulps that Figgie does not give payment bonds; however, they said that, if the work was done properly and Block approved, ASI would get paid. Block also said ASI should not worry about payment and get started on the job. The parties also discussed a letter from Figgie agreeing to set aside funds from the mortgage for payment to ASI.

On November 27, 1989, Fulps, John Sumners, a co-owner of ASI, Looney and Block again met. In response to Sumners' request for a payment assurance or guarantee, Block advised him ASI would get a set aside or indemnification letter. Block told Summers that he would get him an assurance letter and again reiterated that ASI would get paid if he

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[1] *Under the loan agreement, Figgie approved all contractors, approved all contracts, inspected the work as it progressed, approved all periodic payouts if the work had been done properly, and obtained assignments of all construction contracts between the Debtor and the contractors. The agreement also allowed Figgie to declare the loan in default and refuse to make further advances on the asbestos removal and other renovations, if Skelly defaulted on its monthly mortgage payments.*

(Block) approved the work. Sumners -- who said ASI had no faith in Skelly's ability to pay -- informed Block that ASI would not begin work until such an assurance letter was written. Block indicated the letter would be sent. A similar conversation took place between Sumners and Wood in January of 1990.

On January 9, 1990, ASI and Skelly entered into two contracts for the removal of the asbestos from the hotel. Figgie approved both contracts. The first contract, referred to as the "Base Bid" and as Alternates Nos. 1 and 2, was for $151,650. The second contract, described as Alternate No. 3, was for $425,860. Each contract covered different phases of the asbestos removal.

Prompted by repeated requests from Fulps and Sumners, Wood wrote a February 2, 1990 letter to ASI. The letter stated:

> **Please accept this letter as confirmation that Figgie Acceptance Corporation ("FAC") has, under the Loan Agreement between 5000 Skelly Corporation and FAC, dated July 7, 1989, provided for the funding of the following contracts at the stated amounts.[2]...These funds are now available for disbursement in accordance with the Loan Agreement. We trust this satisfies your requirements. Sincerely, /s/ Stephen P. Wood, Marketing Representative.**

Once the letter was received, ASI began asbestos work on February 12, 1990. During the course of the work, ASI received progress payments. However, in May of 1990, Sumners called Wood because ASI had trouble in receiving a progress payment from Skelly. Wood assured Sumners that ASI would be paid if it did the work.[3] Yet, when the work was completed in July of 1990, Skelly still owed ASI $156,369.

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[2] *The letter also stated that the first contract (alternates 1 and 2) was for $151,650 and that the second contract (alternate 3) was for $425,860.*

[3] *From November 1989 through July 1990, Skelly was chronically late in its mortgage payments to Figgie.*

On July 26, 1990, Figgie declared Skelly's loan in default and accelerated the balance due of $5,100,967.83. After declaring the loan in default, Figgie refused to pay ASI for the asbestos work. Such a refusal was the first notification ASI had received from Figgie that it was not going to pay for the work.[4]

Skelly subsequently filed for bankruptcy on September 12, 1990. On October 29, 1991, the Trustee sold the hotel property to Figgie for $4.35 million. On November 27, 1991, Figgie asked the Bankruptcy Court to find that its mortgage had priority over ASI's lien. The Bankruptcy Court refused to do so and stated:

> **Under these circumstances, it would be unequitable and unfair to allow Figgie, as current owner of the property, to accept the benefits of the roofing repairs and not pay for them as they promised to do on many occasions in one form or another. Under either the state law doctrine of equitable estoppel or equitable subordination under the Bankruptcy Code, the mortgage claim of Figgie must be subordinated to the mechanic's lien of ASI.**

On October 22, 1990, ASI filed a lawsuit in this Court against Figgie, seeking to recover the $156,359 owed. In a January 16, 1992 Order, Figgie's Motion For Summary Judgment was sustained. Part of that Order read:

> **From a review of the contractual instrument - the set aside letter in accordance with terms of the Loan Agreement - the Court concludes as a matter of law that Figgie has no contractual obligation to guarantee payment to ASI for work performed under the asbestos abatement contracts. The Court further rejects ASI's estoppel argument...The fact that ASI interpreted the plain language of the set aside letter as a guarantee calls into question ASI's good judgment, not Figgie's good faith.** *See Case No. 90-C-900-B, Order, pp. 6-7 (docket #35).*[5]

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[4] *The Bankruptcy Court also found that Figgie had never notified ASI that its payment was dependent upon Skelly being current on its mortgage payments or even that Skelly had been chronically late in making those payments.*

[5] *ASI later filed a Motion To Amend or Alter The Judgment in reference to the above Order. That motion was denied, but the Court stated that its January 16, 1992 Order did not "preclude ASI from pursuing its claims in the bankruptcy proceedings" on the issues of equitable subordination and estoppel.*

II. Standard of Review

The standard of review of the Bankruptcy Court's findings of fact is "clearly erroneous." In this case, an examination of the record shows that the Bankruptcy Court's findings of facts were not clearly erroneous.

Equitable relief, 11 U.S.C. §510(c), is addressed to the sound discretion of the Bankruptcy Court, and, therefore, the standard of review of such decision is whether the court abused its discretion. Conclusions of law, however are reviewable *de novo*, and an exercise of discretion based on an erroneous conclusion of law can be freely overturned by an appellate court. *Matter of Poole, McGonigle & Dick, Inc.*, 796 F.2d 318, 321 (9th Cir. 1986).

III. Legal Analysis

Figgie recorded its mortgage before City filed its mechanic's lien. That means, in a normal course, the proceeds of the hotel sale would go to Figgie. ASI, as an unsecured creditor, would be paid nothing. The Bankruptcy Court, however, subordinated Figgie's mortgage claim to ASI's lien on grounds of equitable estoppel and equitable subordination under 11 U.S.C. §510(c). That ruling allowed ASI to be paid in full on its claim.

The issue is whether the Bankruptcy Court erred in its application of equitable subordination. Section 510(a) of the Bankruptcy Code states: **"The court may...(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another interest; or (2) order that any lien securing such a subordinated claim be transferred to the estate."**

The statute does not set forth standards as to when subordination should be ordered. Instead, Congress left development of the principle to the courts. *In Re Badger Freight Truckways, Inc.,* 106 B.R. 971, 975 (Bankr. N.D.Ill. 1989). That development has resulted in most courts adopting the following three-prong test:

> **1. The claimant (i.e. Figgie) must have engaged in some type of inequitable conduct;**
>
> **2. The misconduct must have resulted in injury to the creditors of the bankrupt (i.e. ASI) or conferred an unfair advantage on the claimant; And**
>
> **3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.** *Matter of Mobile Steel Co.*, 563 F.2d 692, 699-700 (5th Cir.1977). *Also, see In Re Castleton,* 990 F.2d 551, 558 (10th Cir. 1992).

For purposes of this case, the second and third-prongs of the *Mobile Steel* test need not be discussed.[6] Instead, the heart of this appeal focuses on whether Figgie's actions meet the first prong of the subordination test: **Did Figgie engage in "some type of inequitable conduct?"** [7]

Exactly what constitutes inequitable conduct has not been consistently defined by past decisions. *See, In Re Osborne*, 42 B.R. 988, 996 (W.D. Wis. 1984). ("degree of misconduct difficult to state"). There is no question that fraud, misrepresentation, spoilation and overreaching constitute inequitable conduct, but Figgie's culpability falls

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[6] *The second and third prongs of the Mobile Steel test are met. The facts indicate here that Figgie's conduct gave it an unfair advantage over City and that equitable subordination in the case at bar would not be inconsistent with other Bankruptcy Act provisions.*

[7] *Courts have developed two standards of "inequitable conduct". If the creditor is an insider or a fiduciary, the trustee seeking subordination is held to a lighter burden, in effect to show "unfair" conduct. Once the trustee does this, the creditor must counter by proving the fairness of his transactions with the debtor or his claim will be subordinated. In Re N&D Properties, Inc., 799 F.2d 726, 731 (11th Cir. 1986). However, a different standard must be met by the trustee if the creditor is neither an insider nor a fiduciary. The creditor's conduct must be more culpable. Examples of the latter category include fraud, misrepresentation, spoilation or overreaching. In Re Castleton, 990 F.2d at 559. In the instant case, Figgie is neither an insider or a fiduciary.*

short of those. Therefore, the issue is whether Figgie's actions -- admittedly short of fraud, misrepresentation, spoilation and overreaching -- constituted inequitable conduct.

In deciding the instant appeal, this Court must remember that subordination is an equitable remedy of the Bankruptcy Court. **As such, the remedy of "equitable subordination must remain sufficiently flexible to deal with manifest injustice resulting from violation of rules of fair play."** *Matter of Teltronics Services, Inc.* 29 B.R. 139, 172 (Bankr. E.D.N.Y. 1983). There are no concrete requirements; subordination depends on the circumstances of each case. *Fabricators, Inc. v. Technical Fabricators*, 126 B.R. 239, 244 (Bankr. S.D. Miss. 1989).

This flexibility is depicted by the various definitions articulated by courts. Some courts require substantial misconduct. *In Re Osborne,* 42 B.R. at 996. Others, however, have more relaxed standards. See *Matter of Vietri Homes, Inc.,* 58 B.R. 663, 666 (Bankr. D.Del. 1986). Another court writes:

> **Inequitable conduct is that conduct which may be lawful, yet shocks one's good conscience. It means, inter alia, a secret or open fraud; lack of faith or guardianship by a fiduciary; an unjust enrichment, not enrichment by ... chance, astuteness of business acumen, but enrichment through another's loss brought about by one's own unconscionable, unjust, unfair, close, or double dealing or foul conduct.** In *Matter of Harvest Milling Company*, 221 F.Supp. 836, 838 (D. Ore. 1963).

That definition, while written in 1963, is in line with case law today. Such a definition also is similar with recent decisions by Seventh and Third Circuits. Those federal appellate decisions allow courts, in limited circumstances to use a "fairness" standard as opposed to some type of rigid requirement that a creditor engage in inequitable conduct. *Matter of Virtual Network Services Corp.*, 902 F.2d 1246, 1249 (7th Cir. 1990) and *Burden*

v. United States, 917 F.2d 115, 120 (3rd Cir. 1990). These decisions allow the bankruptcy courts more latitude and flexibility in enforcing subordination on a case-by-case basis.

In the instant case, the Bankruptcy Court did not err in concluding that Figgie's claim should be subordinated. ASI communicated to Figgie several times that it was concerned about Skelly's financial situation. As a result, Figgie wrote a letter and Block told ASI that it would get paid if the asbestos removal was done satisfactorily. Neither Block nor Wood said that such representations were contingent on Skelly's financial viability. ASI then completed the work, but did not get paid in full. Figgie received the benefit of the asbestos removal when it purchased the hotel property from the Trustee. Thus, the Bankruptcy Court did not err.

IV. Conclusion

In sum, the Bankruptcy Court's decision that Figgie engaged in inequitable and unfair conduct was proper, given the circumstances of this particular case. Therefore, the Bankruptcy Court decision to subordinate Figgie's claim to that of ASI's is **AFFIRMED.**

SO ORDERED THIS 12 day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD VERNON HARRIS and **REBA KATHRYN HARRIS**

Plaintiffs,

vs.

Case No. 93-C-0081-B

OKLAHOMA HORSE RACING COMMISSION, an Administrative Agency of the State of Oklahoma,

BENNY C. LOVETT, individually, and as OHRC Director of Law Enforcement,

ROYCE HODGES, individually, and as Chief Agent of the OHRC Law Enforcement Division,

CLAUDE SHOBERT, individually, and as agent of the OHRC Law Enforcement Division,

CHARLIE COX, individually, and as Racing Steward & OHRC employee,

NORMA PRIDE-CALHOUN, individually, and as Racing Steward & OHRC employee,

and,

DAVID SOUTHARD, individually, and as Racing Steward & OHRC employee,

Defendants.

O R D E R

The Court has for consideration Defendant Oklahoma Horse Racing Commission's (OHRC) Motion to Dismiss (Docket #13) this

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action under authority of Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1]

I. STATEMENT OF THE CASE

Plaintiffs Clifford Vernon Harris and Reba Kathryn Harris, are citizens of the United States and residents of the Northern District of the State of Oklahoma. The Plaintiffs maintain a residence in Owasso, Tulsa County, Oklahoma.

The Defendant, Oklahoma Horse Racing Commission, is an administrative agency of the State of Oklahoma created pursuant to Okla. Stat. tit. 3A § 201. The individually named Defendants are employees of the OHRC. Plaintiffs allege that the six OHRC employees who have been named as defendants, were acting in both their official capacities and individual capacities.

Plaintiff Clifford Harris, is a horse owner and trainer. Clifford Harris was also an occupational licensee of the Oklahoma Horse Racing Commission during all times relevant to this action. Plaintiff Reba Harris is not a licensee of the Oklahoma Horse Racing Commission.

Plaintiffs Clifford Harris and Reba Harris also manufactured and sold small electrical devices, known as "buzzers" or "bugs," which are used in the racing industry to stimulate horses. These devices were manufactured and sold from their home in Owasso, Oklahoma.

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[1] Defendant's previous two Motions to Dismiss, first motion filed March 24, 1993 (Docket #4) and the second filed on March 29, 1993 (Docket #9), are both hereby moot.

Plaintiffs allege that prior to the running of a pari-mutual race at Remington Park on June 1, 1991, the Clerk of the Scales, allegedly an OHRC employee, advised Plaintiff Clifford Harris that he should employ a jockey other than the black jockey he normally employed.[2] Clifford Harris contends the Clerk of the Scales implied that black jockeys were unacceptable. Nevertheless, he disregarded the Clerk's comments and ran his horse in the 10th race, employing his usual black jockey.

Clifford Harris' horse won the race, but was subsequently disqualified for allegedly interfering with another horse. The disqualification came under the direction of Defendants Charlie Cox, Norma Pride-Calhoun and David Southard, all OHRC racing stewards. As a result of the disqualification, Clifford Harris was denied any portion of the prize money for that race.

Clifford Harris asserts that following the disqualification he requested a formal hearing before the aforementioned stewards and before the OHRC. However, no official hearing was ever granted or held. Clifford Harris alleges he continued to protest the June 1, 1991, race disqualification and as a result he was told "the OHRC would, in essence, go after him, for pursuing his protest."[3]

On September 19, 1991, agents of the OHRC Law Enforcement

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[2] Defendants assert that the Clerk of the Scales is not an employee of the Oklahoma Horse Racing Commission. Defendants contend that under Article 4 of the Oklahoma Horse Racing Rules of Racing, the Clerk of the Scales is an employee of the organization licensee, in this case, Remington Park. Defendant's Brief pg. 5.

[3] Plaintiff's complaint does not name the individual(s) who allegedly made this threat.

Division obtained a search warrant in Tulsa County District Court for the search of the Harris' home and for the seizure of items related to the manufacture and sale of electronic "buzzers." The Harris' home was subsequently searched and items relating to the manufacture of the "buzzers" were removed.

On September 25, 1991, criminal charges were filed against Plaintiff Clifford Harris and his spouse Reba Harris, alleging three felony counts of "Possession of Electrical Horse Racing Devices with Intent to Sell," in violation of Okla. Stat. tit. 3A § 208.7.[4] On November 26, 1991, Tulsa County Special Magistrate Bob Perugino, sustained the Harris' demurrer to the charges and ordered the case against the Plaintiffs dismissed.

The Plaintiffs allege that these acts violated their constitutional rights and are actionable under 42 U.S.C. §§ 1983 and 1985(2). Plaintiffs also assert claims of malicious prosecution, abuse of process and intentional interference of business relations.

II. STATEMENT OF 12(B)(6) STANDARD

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded

[4] Plaintiffs argue that § 208.7 only prohibits the use, manufacture or possession of such devices within the confines of a horse racing facility operated under the authority of the OHRC.

facts. **Jones v. Hopper**, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. **Olpin v. Ideal National Ins. Co.**, 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970).

III. Analysis and Authorities

Defendant Oklahoma Horse Racing Commission and the six OHRC employees, ask that Plaintiffs' claims be dismissed under authority of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, as to Plaintiffs' first cause of action under 42 U.S.C. § 1983, Defendants assert that a § 1983 suit cannot be maintained in federal court against either the OHRC or the six employees in their official capacities. As to Plaintiffs claim under 42 U.S.C §1985(2), Defendants assert this claim must fail because Plaintiffs failed to allege the requisite elements necessary to establish existence of a conspiracy. Finally, Defendants assert Plaintiffs' state tort claims for malicious prosecution, abuse of process and intentional interference of business relations, are barred in federal court by Oklahoma's sovereign immunity and by the Eleventh Amendment.

Plaintiffs named the Oklahoma Horse Racing Commission and six OHRC employees, in their official and individual capacities, in all five causes of action. The Oklahoma Horse Racing Commission is an administrative agency of the State of Oklahoma. Okla. Stat. tit. 3A §§ 200-208. As an administrative agency, any suit against the OHRC is a suit against the State itself. **Pennhurst State School &**

Hosp. v. Halderman, 465 U.S. 89, 100 (1984).

Plaintiffs' attempts to recover damages from the OHRC employees in their official-capacities, are also considered attempts to recover against the state, rather than from the official's personal assets. **Kentucky v. Graham**, 473 U.S. 159 (1985). In **Will v. Michigan Dept. of State Police**, the Supreme Court stated that "[a] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. (citation omitted) As such, it is no different from a suit against the State itself." 491 U.S. 58, 70 (1989). Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." **Graham**, 473 U.S. at 165 (citing **Monell v. New York City Dept. of Social Services**, 436 U.S. 658, 690, n. 55 (1978)). State officials who are sued in their official capacities "assume the identity of the government that employs them." **Hafer v. Melo**, 112 S. Ct. 358, 362 (1991). Thus, in naming the six OHRC employees in their official capacities, Plaintiffs do not seek a judgement against the individuals, but rather against the State of Oklahoma.

The Eleventh Amendment protects States from suits for monetary damages in federal court. **Graham**, 473 U.S. at 169-70. In **Graham**, the Supreme Court stated that "absent waiver by the State or valid congressional over-ride, the Eleventh Amendment bars a damages action against a State in federal court." **Id**. Thus, the Eleventh Amendment is an absolute bar to suits brought against the states

and their agencies in federal court "without the state's express or implied consent or express abrogation by Congress of the states' Eleventh Amendment Immunity." **Parents for Qual. Educ. v. Ft. Wayne Comm. Schools**, 662 F.Supp. 1475 (N.D. Ind. 1987).[5] The Eleventh Amendment also bars official-capacity suits brought in federal court seeking damages against State officers. **Graham**, 473 U.S. at 169-70. Therefore, Plaintiffs' five claims, insofar as the complaint names either the Oklahoma Horse Racing Commission or any of the six OHRC employees in their official capacities, are barred by the Eleventh Amendment and must be dismissed.

Plaintiffs' 42 U.S.C. § 1983 suit against the six employees in their official-capacities, is not only barred by the Eleventh Amendment but also barred by the basic requirements of §1983 itself. Since an official-capacity suit is really against the State itself, the State must meet the requirements of 42 U.S.C. § 1983 as a proper defendant. Section 1983 provides, in relevant part:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

In **Will v. Michigan Dept. of State Police**, the Supreme Court held

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[5] It has also been held that Congress did not abrogate a states' Eleventh Amendment immunity by enacting 42 U.S.C. §§ 1983 or 1985. **Id.** at 1480. **See also Quern v. Jordan**, 440 U.S. 332, 339-346 (1979); **Alabama v. Pugh**, 438 U.S. 781 (1978).

that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. 58, 71 (1989). Thus, Plaintiffs' claims against the OHRC employees in their official capacities cannot be maintained because the Defendants are not "persons" under § 1983.

Plaintiffs' assert that States and state officials acting in their official capacities should be considered a "person" under § 1983. Plaintiffs further assert that the Supreme Court's holding in **Will** should be overruled because of a "definite lack of agreement within the Court." (Plaintiffs' Response Brief to Defendants' Motion to Dismiss pg. 2). Plaintiffs fail to consider that subsequent to the **Will** decision, the United States Supreme Court has cited the **Will** opinion with approval. **See Hafer v. Melo**, 112 S. Ct. 358, 362-63 (1991). Despite Plaintiffs' request, this Court declines to overrule the United States Supreme Court.

IV. CONSPIRACY

Plaintiffs in their Second Cause of Action allege that all of the Defendants conspired together "for the purpose of impeding, hindering, obstructing or defeating the course of justice in the State of Oklahoma with the intent to deny the Plaintiffs equal protection of the laws." (Plaintiffs' First Amended Complaint, pg. 11). As is true in the other four causes of action, any suit for damages against the Oklahoma Horse Racing Commission or the OHRC employees in their official capacities is barred by the Eleventh Amendment. **Graham**, 473 U.S. at 169.

However, Plaintiffs have also asserted a 42 U.S.C. § 1985(2)

conspiracy suit against the six OHRC employees in their individual capacities. In part, 42 U.S.C. § 1985 (2) states:

> [I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws . . . .

This particular portion of § 1985, under which Plaintiffs sue the OHRC employees, requires Plaintiffs to prove that the employees' actions were motivated by an intent to deprive the Plaintiffs of the equal protection of the laws. **Kush v. Rutledge**, 460 U.S. 719, 725 (1982).

In **Kush v. Rutledge**, the Supreme Court stated: "[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, individiously discriminatory animus behind the conspirators' action." 460 U.S. at 726, quoting **Griffin v. Breckenridge**, 403 U.S. 88, 102 (1971). Although **Griffin** interpreted 42 U.S.C. § 1985(3), there is an abundance of authority construing § 1985(2) as also requiring the "racial or perhaps otherwise class-based, invidiously discriminatory animus" element of **Griffin**. The Court of Appeals for the Tenth Circuit affirmed the **Griffin** requirements for § 1985(2) suits in **Smith v. Yellow Freight Systems, Inc**, 536 F.2d 1320, 1323 (10th Cir. 1976).

Defendants assert that Plaintiffs' conspiracy claim is "fatally flawed" because it fails to allege a race or other class based animus as required for claims asserting the obstruction of due course of justice in a state court. Plaintiffs assert that

they are a "constructive member of the class because the discrimination against them is a direct result of their choice to hire and support a black employee and thus they suffer as a result of race discrimination against blacks." (Plaintiff's Response Brief pg. 10). Plaintiffs assert that § 1985 was intended to reach class-based animus against negroes and their supporters. **See Carpenters v. Scott**, 463 U.S. 825 (1983).

This Court finds that Plaintiffs have failed to allege the required race or class-based discrimination as required. In **Silkwood v. Kerr-McGee**, 637 F.2d 743, 748 (10th Cir. 1980), the court quoted with approval the legislative history of hearings on the Civil Rights Act of 1871. In that history, Senator Edmunds in his justification of the 1871 Civil Rights Act expounded on the types of conspiracies he considered to be covered by § 1985. The Edmunds' quote provided in part:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section should reach it.

Cong. Globe, 42nd Congress, 1st Sess. 567 (1871). Although the scope of the Edmunds quote was narrowed in **Carpenters**, it is evident that Plaintiffs' claims of conspiracy still fall short.

This Court finds Plaintiffs have failed to sufficiently allege "racial or class-based animus" and have therefore failed to state

a claim under § 1985(2). From the record before the Court, it does not appear that Plaintiffs are members of a racial minority.[6] Additionally, the Plaintiffs have not filed suit as members of a class based on religious or political beliefs or associations (types of protected classes under the original Ku Klux Klan Act). Furthermore, 42 U.S.C. § 1985 does not reach economic or commercially-motivated conspiracies. **Rayborn v. Mississippi State Board of Dental Examiners**, 776 F.2d 530, 532 (5th Cir. 1985). It appears that Plaintiffs are not members of a class having any type of common characteristics that could equate to the type of class that § 1985 was designed to protect and therefore, this claim should be dismissed.

V. TORT CLAIMS

Plaintiffs in their third, fourth, and fifth causes of action allege state tort claims of malicious prosecution, abuse of process and intentional interference of business relations. This Court has previously stated that the tort claims, insofar as they name either the OHRC or any of the six employees in their official capacities must be dismissed, absent a waiver by the State or valid congressional over-ride. **Graham**, 473 U.S. at 169.

As to the three tort claims alleged against the OHRC or the employees in their officials capacities, this Court finds that such claims are barred from suit in federal court by the Eleventh Amendment and must be dismissed. Although Oklahoma has waived its

[6] It is Defendants' belief that all of the Plaintiffs and all of the Defendants in this action are White Caucasians. Plaintiffs have failed to make any allegations to the contrary.

sovereign immunity to the extent set out in the Governmental Tort Claims Act, it has not waived its rights under the Eleventh Amendment.[7] Thus, any tort claims suit against the State of Oklahoma must be brought in the district courts of Oklahoma. In providing the Governmental Tort Claims Act, Oklahoma has consented to be sued in its own courts without waiving its immunity in the federal courts.

Plaintiffs assert that their state tort claims may be brought and heard in federal court by this Court's exercise of pendent jurisdiction. (Plaintiff's Brief at 5). However, the Supreme Court has held that the Eleventh Amendment bar applies to pendent claims as well. **Pennhurst**, 465 U.S. at 120. In **Pennhurst**, the Court stated that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." **Id.** at 121. Thus, Plaintiffs' assertion that this Court can hear the state actions by exercising pendent jurisdiction, is simply not supported by authority. If this Court were to exercise pendent jurisdiction

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[7] Section 152.1 of the Governmental Tort Claims Act provides:

> (A) The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts.
>
> (B) The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution. (emphasis added).

and hear Plaintiffs' claims, it would be in a position to award damages against a State. This intrusion by pendent jurisdiction into the Eleventh Amendment bar has been explicitly prohibited. **Id.** at 120-21; **See also Edelman v. Jordan**, 415 U.S 651 (1974). For the foregoing reasons, Plaintiffs' assertion that this Court could exercise pendent jurisdiction must fail.

For the above stated reasons, the tort claims against the OHRC and the OHRC employees in their official capacities must be dismissed. Defendants' Motion to Dismiss did not contest the Plaintiffs' claims against the OHRC employees in their individual capacities and thus such claims remain before the Court.

VI. CONCLUSION

For the reasons set out above, Defendants' Motion to Dismiss the Oklahoma Horse Racing Commission and the six OHRC employees in their official capacities from all five causes of action, should be and is hereby **GRANTED**. Defendants' Motion to Dismiss the § 1985 claim in its entirety is hereby **GRANTED**. Thus, the only remaining causes of action in this suit are the § 1983 claim and the tort claims against the six employees in their individual capacities.

IT IS SO ORDERED this 12th day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FIGGIE ACCEPTANCE CORPORATION,

Plaintiff,

v.

CITY ROOFING COMPANY,

Defendant.

92-C-0539-B

ORDER

The United States Bankruptcy Court for the Northern District of Oklahoma subordinated a mortgage claim of Appellant Figgie Acceptance Corporation ("Figgie") to a mechanic's lien held by Appellee City Roofing ("City"). Figgie now appeals that decision, arguing that the Bankruptcy Court improperly applied the doctrine of equitable subordination under 11 U.S.C. §510(c).

I. A Summary of the Facts and Procedural History

The events leading up to this appeal began on July 7, 1989 when Figgie loaned 5000 Skelly Corporation ("Skelly") $6.5 million. Of the $6.5 million, Skelly used $3.5 million to buy a Tulsa hotel called "Park Plaza". The remaining $3 million, pursuant to an 11-page loan agreement, was for asbestos abatement and renovating the hotel. That money was to be advanced to Skelly by Figgie based on the progress of the renovation.[1] Figgie took a mortgage on the hotel property to secure its loan.

[1] *Under the loan agreement, Figgie approved all contractors, approved all contracts, inspected the work as it progressed, approved all periodic payouts if the work had been done properly, and obtained assignments of all construction contracts between the Debtor and the contractors. The agreement also allowed Figgie to declare the loan in default and refuse to make further advances on the roofing and other renovations, if Skelly defaulted on its monthly mortgage payments.*

Hotel renovation began. As a part of that renovation, on November 27, 1989, Skelly awarded Appellee City a $126,000 contract to repair the roof.[2] However, when the contract was signed, questions about Skelly's financial health surfaced. As a result, a meeting was held on November 27, 1989, attended by the following persons: **Lewis Thomas**, the owner of City Roofing; **William Smith**, Skelly's principal owner; **Ron Looney**, Skelly's on-the-job manager; and **Neil Block**, a Houston, Texas construction consultant and Figgie's on-site construction supervisor.[3]

Thomas requested that Block write a set-aside letter. Stephen Wood, who was in charge of the project for Figgie, subsequently wrote the following letter to Skelly president W.B. Smith on December 11, 1989:

> **As previously stated in our letter of October 25, 1989, the $126,0000 which has been contracted for the work to be done on the roof of the Park Plaza, has been approved as reimbursable renovation expenditure under the construction loan agreement between 5000 Skelly Corporation and Figgie Acceptance Corporation, dated July 7, 1989. Bimonthly payments will be allowed so long as draw requests are made timely and in accordance with the loan agreement and accompanied by the appropriate draw requests and lien waivers.**
>
> **Sincerely,**
> **/s/Stephen P. Wood**
> **Marketing Representative**

Once the letter was received, Thomas notified Skelly that roofing work would start December 26, 1989. On January 23, 1990, Block -- who routinely inspected City's work -- discovered what he believed to be excessive pools of water on the roof. To eliminate the

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[2] *The roofing was to performed under Tamco 605 procedures.*

[3] *Block inspected all work on the project. If he approved the work, he would recommend to Steve Wood, a Figgie marketing representative, that payments be made to the various sub-contractors.*

problem, Block changed the specifications contained in the original contract. Those changes "upped" the contract price by some $40,000, but the parties nevertheless agreed to the revised contract amount of $166,000. Block assured Thomas that, if the work was done satisfactorily, City would get paid.

As City continued its work on the roof, Block told Thomas on several occasions that City would be paid if the work was done satisfactorily. In July of 1990, City completed roof repairs to the complete satisfaction of Skelly and Block. At the time the work was completed, City had been paid most of the contract price; however, Skelly still owed City $17,403.75.

Problems then surfaced. The financial situation of Skelly, heretofore chronically late in its mortgage payments to Figgie since November of 1989, soured. Figgie declared the loan in default on July 26, 1990, but refused to pay City or any other contractors for the work performed.

Skelly filed Chapter 11 bankruptcy on September 12, 1990.[4] On November 2, 1990, City perfected its mechanics lien. On October 29, 1991, the Trustee sold the hotel property to Figgie for $4.35 million. On November 27, 1991, Figgie asked the Bankruptcy Court to find that its mortgage had priority over City's lien. The Bankruptcy Court refused to do so, stating:

> **Under these circumstances, it would be unequitable and unfair to allow Figgie, as current owner of the property, to accept the benefits of the roofing repairs and not pay for them as they promised to do on many occasions in one form or another. Under either the state law doctrine of equitable estoppel or equitable subordination under the Bankruptcy Code, the**

[4] *The bankruptcy was later converted to a Chapter 7 proceeding.*

mortgage claim of Figgie must be subordinated to the mechanic's lien of City Roofing.

Figgie appealed that decision to this Court on June 19, 1992. On February 10, 1992, an advisory hearing was held where Thomas represented City *pro se*. Ms. Angelyn Dale, a Tulsa attorney, represented Figgie.

II. Standard of Review

The standard of review of the Bankruptcy Court's findings of fact is "clearly erroneous." In this case, an examination of the record shows that the Bankruptcy Court's findings of facts were not clearly erroneous.

Equitable relief, 11 U.S.C. §510(c), is addressed to the sound discretion of the Bankruptcy Court, and, therefore, the standard of review of such decision is whether the court abused its discretion. Conclusions of law, however are reviewable *de novo*, and an exercise of discretion based on an erroneous conclusion of law can be freely overturned by an appellate court. *Matter of Poole, McGonigle & Dick, Inc.*, 796 F.2d 318, 321 (9th Cir. 1986).

III. Legal Analysis

Figgie recorded its mortgage before City filed its mechanic's lien. That means, in a normal course, the proceeds of the hotel sale would go to Figgie. City, as an unsecured creditor, would be paid nothing. The Bankruptcy Court, however, subordinated Figgie's mortgage claim to City's lien on grounds of equitable estoppel and equitable subordination under 11 U.S.C. §510(c). That ruling allowed City to be paid in full on its $17,403.75 claim.

The issue is whether the Bankruptcy Court erred in its application of equitable subordination.[5] Section 510(a) of the Bankruptcy Code states: **"The court may...(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another interest; or (2) order that any lien securing such a subordinated claim be transferred to the estate."**

The statute does not set forth standards as to when subordination should be ordered. Instead, Congress left development of the principle to the courts. *In Re Badger Freight Truckways, Inc.,* 106 B.R. 971, 975 (Bankr. N.D.Ill. 1989). That development has resulted in most courts adopting the following three-prong test:

> **1. The claimant (i.e. Figgie) must have engaged in some type of inequitable conduct**
>
> **2. The misconduct must have resulted in injury to the creditors of the bankrupt (i.e. City) or conferred an unfair advantage on the claimant; And**
>
> **3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.** *Matter of Mobile Steel Co.*, 563 F.2d 692, 699-700 (5th Cir.1977). *Also, see In Re Castleton,* 990 F.2d 551, 558 (10th Cir. 1992).

For purposes of this case, the second and third-prongs of the *Mobile Steel* test need not be discussed.[6] Instead, the heart of this appeal focuses on whether Figgie's actions meet the first prong of the subordination test: **Did Figgie engage in "some type of**

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[5] *Figgie also asserts that Appellee City's brief is not in accordance with Bankruptcy Rule 8010. This Court agrees. However, an examination of the entire record will be made to determine whether the Bankruptcy Court has erred.*

[6] *The second and third prongs of the Mobile Steel test are met. The facts indicate here that Figgie's conduct gave it an unfair advantage over City and that equitable subordination in the case at bar would not be inconsistent with other Bankruptcy Act provisions.*

inequitable conduct?" [7]

Exactly what constitutes inequitable conduct has not been consistently defined by past decisions. See, *In Re Osborne*, 42 B.R. 988, 996 (W.D. Wis. 1984). ("degree of misconduct difficult to state"). There is no question that fraud, misrepresentation, spoilation and overreaching constitute inequitable conduct, but Figgie's culpability falls short of those. Therefore, the issue is whether Figgie's actions -- admittedly short of fraud, misrepresentation, spoilation and overreaching -- constituted inequitable conduct.

In deciding the instant appeal, this Court must remember that subordination is an equitable remedy of the Bankruptcy Court. **As such, the remedy of "equitable subordination must remain sufficiently flexible to deal with manifest injustice resulting from violation of rules of fair play."** *Matter of Teltronics Services, Inc.* 29 B.R. 139, 172 (Bankr. E.D.N.Y. 1983). There are no concrete requirements; subordination depends on the circumstances of each case. *Fabricators, Inc. v. Technical Fabricators*, 126 B.R. 239, 244 (Bankr. S.D. Miss. 1989).

This flexibility is depicted by the various definitions articulated by courts. Some courts require substantial misconduct. *In Re Osborne,* 42 B.R. at 996. Others, however, have more relaxed standards. See *Matter of Vietri Homes, Inc.,* 58 B.R. 663, 666 (Bankr. D.Del. 1986). Another court writes:

> **Inequitable conduct is that conduct which may be lawful, yet shocks one's good conscience. It means, inter alia, a secret or open fraud; lack of faith or**

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[7] *Courts have developed two standards of "inequitable conduct". If the creditor is an insider or a fiduciary, the trustee seeking subordination is held to a lighter burden, in effect to show "unfair" conduct. Once the trustee does this, the creditor must counter by proving the fairness of his transactions with the debtor or his claim will be subordinated. In Re N&D Properties, Inc., 799 F.2d 726, 731 (11th Cir. 1986). However, a different standard must be met by the trustee if the creditor is neither an insider nor a fiduciary. The creditor's conduct must be more than unfair. Examples of the latter category include fraud, misrepresentation, spoilation or overreaching. In Re Castleton, 990 F.2d at 559. In the instant case, Figgie is neither an insider or a fiduciary.*

> **guardianship by a fiduciary; an unjust enrichment, not enrichment by ... chance, astuteness of business acumen, but enrichment through another's loss brought about by one's own unconscionable, unjust, unfair, close, or double dealing or foul conduct.** In *Matter of Harvest Milling Company*, 221 F.Supp. 836, 838 (D. Ore. 1963).

That definition, while written in 1963, is in line with case law today. Such a definition also appears to have similarities with recent decisions by Seventh and Third Circuits. Those federal appellate decisions allow courts, in limited circumstances to use a "fairness" standard as opposed to some type of rigid requirement that a creditor engage in inequitable conduct. *Matter of Virtual Network Services Corp.*, 902 F.2d 1246, 1249 (7th Cir. 1990) and *Burden v. United States,* 917 F.2d 115, 120 (3rd Cir. 1990). Such holdings allow the bankruptcy courts more latitude and flexibility in enforcing subordination on a case-by-case basis.

In the instant case, the Bankruptcy Court did not err in subordinating Figgie's mortgage claim. Figgie had complete control of the construction job. Neil Block, Figgie's consultant, told Lewis Thomas, City's owner, on several occasions that he would get paid if the work was completed satisfactorily. Stephen Wood, who was in charge of the hotel renovation for Figgie, also wrote a letter assuring City it would be paid. In addition, neither Block nor Wood told City that it would <u>not</u> get paid if Skelly defaulted on its mortgage payments. Lastly, Figgie bought the hotel property and, consequently, received the benefits of City's work.

Figgie's actions were inequitable as the lender received an unjust enrichment. Figgie -- a Fortune 500 company -- coaxed City -- a local roofing company -- into finishing the roofing job, despite Figgie's knowledge of Skelly's financial position. Then, once City

finished the job, Skelly files bankruptcy and Figgie refuses to pay a $17,000 bill. To make matters worse for City, Figgie buys the hotel property, which included the now-renovated roof. As a matter of principle, City completed the work and deserved to be paid in full.[8]

IV. Conclusion

In sum, the Bankruptcy Court's decision that Figgie's engaged in inequitable and unfair conduct was proper, given the circumstances of this particular case. Therefore, the Bankruptcy Court decision to subordinate Figgie's claim to that of City's is **AFFIRMED.**

SO ORDERED THIS 12 day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[8] *In a nearly identical case, the Court concluded that, as a matter of law, that Abatement Systems, Inc. could not rely on the set-aside letter as a guarantee of payment. See Abatement Systems, Inc. v. Figgie Acceptance Co., 90-C-900-B (docket #35). However, the issue of equitable subordination was not before the Court at that time.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GRETCHEN WHITAKER and ED WHITAKER, individually and as parents and next friends of LAUREN WHITNEY and MATTHEW WHITAKER, minors,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign insurance carrier,

Respondent.

No. 92-C-1122B

ORDER OF DISMISSAL

NOW on this 8 day of July, 1993, this matter coming on before me the undersigned Judge of the United States District Court for the Northern District of Oklahoma, and the Court having previously approved the settlement agreement between the parties hereto and having received the Stipulation of Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement which has been fully satisfied and is binding upon each of the parties to this action. Pursuant to the terms of said settlement agreement, that this action is now herein dismissed with prejudice and that the claimants shall be forever barred from pursuing this matter further against the Respondent.

S/ THOMAS R. BRETT

United States District Judge

APPROVED AS TO FORM AND CONTENT:

_____
Gretchen Whitaker, individually
and as parent and next friend
of Lauren Whitney Whitaker,
a minor

_____
Ed Whitaker, individually
and as parent and next friend
of Lauren Whitney Whitaker,
a minor

_____
James Frasier
Attorney for Claimant

_____
Daniel E. Holeman
Martha J. Phillips
Attorney for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GRETCHEN WHITAKER and ED WHITAKER, individually and as parents and next friends of LAUREN WHITNEY and MATTHEW WHITAKER, minors,	)	
Petitioners,	)	
v.	)	No. 92-C-1122B
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign insurance carrier,	)	
Respondent.	)	

ORDER OF DISMISSAL

NOW on this 8 day of July, 1993, this matter coming on before me the undersigned Judge of the United States District Court for the Northern District of Oklahoma, and the Court having previously approved the settlement agreement between the parties hereto and having received the Stipulation of Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement which has been fully satisfied and is binding upon each of the parties to this action. Pursuant to the terms of said settlement agreement, that this action is now herein dismissed with prejudice and that the claimants shall be forever barred from pursuing this matter further against the Respondent.

THOMAS R. BRETT

United States District Judge

APPROVED AS TO FORM AND CONTENT:

_____
Gretchen Whitaker, individually
and as parent and next friend
of Matthew Whitaker,
a minor

_____
Ed Whitaker, individually
and as parent and next friend
of Matthew Whitaker,
a minor

_____
James Frasier
Attorney for Claimant

_____
Daniel E. Holeman
Martha J. Phillips
Attorney for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MITCHEL S. ZABIENSKI and PATTI ZABIENSKI,

Plaintiffs,

v.

THE WHITLOCK CORPORATION, a foreign corporation, d/b/a WHITLOCK AUTO SUPPLY,

Defendant and Third-Party Plaintiff,

v.

ALAMEDA INVESTORS II, Ltd.,

Third-Party Defendant.

No. 91-C-720-C

ORDER

Before the Court is the motion of Third-Party Defendant Alameda Investors II, Ltd. ("Alameda") to tax costs and attorney fees. Plaintiffs sued the defendant Whitlock Corporation ("Whitlock") for an alleged slip-and-fall injury in defendant's store, which defendant leases from Alameda. Whitlock then brought a third-party action against Alameda, based upon the Lease Agreement between Whitlock and Alameda. Whitlock sought to enforce a perceived right of indemnity because of the alleged negligence of Alameda. By Order filed February 26, 1993, the Court held that Whitlock had no right of indemnity from Alameda but rather that Alameda was the indemnitee as to such claims, and granted Alameda's motion for summary judgment as to the third-party claim.

Alameda now seeks to recover its attorney fees based upon the following language in the Lease Agreement: "Tenant shall indemnify and hold Landlord harmless from any loss, cost, expense or claims arising out of such injury or damage referred to in this Article XIV, §14.1."

The Court agrees with Alameda that Oklahoma recognizes the rule that an indemnitee may recover attorney fees from the indemnitor, under appropriate circumstances, despite the fact that the indemnification agreement does not expressly mention attorney fees. See American-First Title & Trust Co. v. First Federal Savings & Loan Ass'n. of Coffeyville, Ks., 415 P.2d 930, 941 (Okla. 1965). Whitlock notes that the Oklahoma Supreme Court went on to say that an express mention of attorney fee recovery in the contract will control, but that is not the situation here.

The remaining question is whether these are appropriate circumstances for recovery of fees by an indemnitee. The Court thinks not. In United General Ins. v. Crane Carrier Co., 695 P.2d 1334, 1339 (Okla. 1984), the Oklahoma Supreme Court said: "The allowance of attorney's fees is limited to the defense of the claim indemnified against and does not extend to services rendered in establishing the right of indemnity." Here, the "claim indemnified against" was a claim brought by plaintiffs such as these directly against Alameda. No such claim was brought. The third-party action here was more in the nature of "indemnification litigation" rather than "defense litigation." Only the latter is properly the subject of an attorney fee award based on an indemnification agreement. An indemnity contract must be strictly construed against him who claims to be an indemnitee. Sinclair Oil & Gas Co. v. Brown, 220 F.Supp. 106, 110 (E.D. Okla. 1963), aff'd, 333 F.2d 967

(10th Cir. 1964). The Court is persuaded that this indemnification agreement contemplates an award of attorney fees only as to suits by third parties against the indemnitee, not an action between the indemnitor and indemnitee themselves. Cf. Brendle's Stores, Inc. v. OTR, 978 F.2d 150, 158 (4th Cir. 1992). The request for fees will be denied; the Court Clerk has awarded Alameda $292.73 in costs. As prevailing party, Alameda is entitled to its costs. Rule 54(d) F.R.Cv.P. As no objection has been filed, the cost award stands.

It is the Order of the Court that the Application of Alameda Investors II, Ltd. to tax attorney fees is hereby denied.

IT IS SO ORDERED this 7th day of July, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VALVERT HESS,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE COMPANY and ITT/HARTFORD,

Defendants.

Case No. 92-C-386-B

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, VALVERT HESS, and his attorney of record, Jack D. Crews, and dismiss all claims against Defendants, National Union Fire Insurance Company and ITT/Hartford, in the above filed and numbered cause with prejudice to the filing of a future action thereon.

Dated this 30th day of June, 1993.

Valvert Hess
VALVERT HESS

Jack D. Crews, OBA #2016
5508 South Lewis Avenue
Tulsa, Oklahoma 74105-7105
Telephone: (405) 742-0282
Attorney for Plaintiff

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK BRADEN; CAROLE R. BRADEN a/k/a CAROL BRADEN a/k/a CAROL R. BRADEN; SECURITY BANK & TRUST COMPANY, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank; POTTS & LONGHORN LEATHER COMPANY n/k/a LONGHORN LEATHER; ROCK MOUNT RANCH WEAR MANUFACTURING COMPANY; JIM CORBIN; COUNTY TREASURER, Osage County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

CIVIL ACTION NO. 92-C-678-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of July, 1993. The Plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; the Defendant, Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank, appears not, having previously filed its Disclaimers; and the Defendants, Frank Braden, Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, Potts & Longhorn

Leather Company n/k/a Longhorn Leather, Rock Mount Ranch Wear Manufacturing Company, and Jim Corbin, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Frank Braden, acknowledged receipt of Summons and Complaint on August 12, 1992; that the Defendant, Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, was served with Summons and Complaint on April 8, 1993; that the Defendant, Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank, was served with Summons and Complaint on December 17, 1992; that the Defendant, Potts & Longhorn Leather Company n/k/a Longhorn Leather, acknowledged receipt of Summons and Complaint on August 12, 1992; that the Defendant, Jim Corbin, acknowledged receipt of Summons and Complaint on August 10, 1992; that Defendant, County Treasurer, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on August 10, 1992; and that Defendant, Board of County Commissioners, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on August 3, 1992.

The Court further finds that the Defendant, Rock Mount Ranch Wear Manufacturing Company, was served by publishing notice of this action in the Pawhuska Journal-Capital, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning January 30, 1993, and continuing through March 6, 1993, as more fully appears from the verified proof of publication duly filed herein; and that this

action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Rock Mount Ranch Wear Manufacturing Company, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Rock Mount Ranch Wear Manufacturing Company. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to its present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, County Treasurer, Osage County, Oklahoma, and Board of County Commissioners, Osage County, Oklahoma, filed their Answer on August 12, 1992; that the Defendant, Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank, filed its Disclaimers on January 27, 1993 and March 31, 1993; that the Defendants, Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, filed an Entry of Appearance and Motion for Enlargement of Time to Answer on April 9, 1993, through their attorney Terry P. Malloy; an Order was entered on June 1, 1993, granting Defendants, Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, an additional 30 days within which to further plead or answer, but Defendants, Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, have failed to answer and their default has therefore been entered by the Clerk of this Court; and that the Defendants, Potts & Longhorn Leather Company n/k/a Longhorn Leather, Rock Mount Ranch Wear Manufacturing Company, and Jim Corbin, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, Shidler State Bank n/k/a Community Bank, is now known as Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real

property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

> NE/4 NE/4 and the N/2 NW/4 NE/4 Section 19, Township 25 North, Range 4 East of I. M. Subject, however, to all valid outstanding easements, rights-of way, mineral leases, mineral reservations and mineral conveyances of record.

The Court further finds that on June 9, 1983, Frank Braden and Carole R. Braden executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $95,000.00, payable in monthly installments, with interest thereon at the rate of 10.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, Frank Braden and Carole R. Braden executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated June 9, 1983, covering the above-described property. Said mortgage was recorded on June 10, 1983, in Book 636, Page 944, in the records of Osage County, Oklahoma.

The Court further finds that the Defendants, Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden, are indebted to

the Plaintiff in the principal sum of $99,816.34, plus accrued interest in the amount of $88,667.69 as of January 19, 1992, plus interest accruing thereafter at the rate of 10.75 percent per annum or $29.3980 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $849.71, plus penalties and interest, for the year(s) 1991, 1992. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Potts & Longhorn Leather Company n/k/a Longhorn Leather, Rock Mount Ranch Wear Manufacturing Company, and Jim Corbin, are in default, and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, **Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R.**

Braden, in the principal sum of $99,816.34, plus accrued interest in the amount of $88,667.69 as of January 19, 1992, plus interest accruing thereafter at the rate of 10.75 percent per annum or $29.3980 per day until judgment, plus interest thereafter at the current legal rate of 3.54 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Shidler State Bank n/k/a Community Bank, should now be shown as Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, have and recover judgment in the amount of $849.71, plus penalties and interest, for ad valorem taxes for the year(s) 1991, 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Security Bank & Trust Company, Successor-In-Interest to Community Bank of Shidler f/n/a Shidler State Bank, Potts & Longhorn Leather Company n/k/a Longhorn Leather, Rock Mount Ranch Wear Manufacturing Company, and Jim Corbin, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Frank Braden and Carole R. Braden a/k/a Carol Braden a/k/a Carol R. Braden**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment of Defendants, County Treasurer and Board of County Commissioners, Osage County, Oklahoma, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

F. L. DUNN, III
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

JOHN S. BOGGS, JR., OBA #0920
Assistant District Attorney
Osage County Courthouse
Pawhuska, Oklahoma 74056
(918) 287-1510
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 92-C-678-B

KBA/css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROSE M. PEACE aka ROSE MARY PEACE pka ROSE MARY DECKARD; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-0061-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of July, 1993. The Plaintiff appears by F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear not, having previously claimed no right, title or interest in the subject property; and the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, appears not, but makes default.

The Court, being fully advised and having examined the court file, finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 28, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 27, 1993.

The Court further finds that the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, was served

by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning April 22, 1993, and continuing to May 27, 1993, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of

residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on February 23, 1993, claiming no right, title or interest in the subject property; that the Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on February 23, 1993, claiming no right, title or interest in the subject property; and that the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 1, 1992, Rose Mary Peace p/k/a Rose Mary Deckard filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-01552-C, she was discharged on September 1, 1992, and the case was closed on December 9, 1992.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Fourteen (14), Block Eight (8), HIDDEN SPRINGS, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof; a/k/a 519 W. Roanoke, Broken Arrow, Oklahoma.

The Court further finds that on July 19, 1990, the Defendant, Rose M. Peace, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, her mortgage note in the amount of $58,595.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent (7.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Rose M. Peace, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated July 19, 1990, covering the above-described property. Said mortgage was recorded on July 19, 1990, in Book 5265, Page 1666, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, is indebted to the Plaintiff in the principal sum of $57,769.33, plus interest at the rate of 7.5 percent per annum from March 1, 1992 until judgment, plus interest thereafter at the legal rate

until fully paid, and the costs of this action in the amount of $279.85 for publication fees.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, is in default and has no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, in the principal sum of $57,769.33, plus interest at the rate of 7.5 percent per annum from March 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.54 percent per annum until paid, plus the costs of this action in the amount of $279.85 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Rose M. Peace a/k/a Rose Mary Peace p/k/a Rose Mary Deckard, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisement, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

for S/ JAMES O. ELLISON

APPROVED:

F.L. DUNN, III
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-0061-E

PP/esr

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA, Plaintiff, -vs.- STANLEY D. BURDICK; REBECCA LYNN BURDICK; SECURITY PACIFIC FINANCIAL SERVICES, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; Defendants.	)	CASE NO. 93-C-373B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 6th day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendants, Tulsa County Treasurer and Board of Tulsa County Commissioners appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the defendant, Stanley D. Burdick, appears not, but makes default; the defendant, Rebecca Lynn Burdick, appears not, but makes default; and the defendant, Security Pacific Financial Services, Inc., appears not, but makes default.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, **Stanley D. Burdick**, acknowledged receipt of Summons and Complaint May 6, 1993, but has failed to otherwise appear and is now in default;

(b) the defendant, **Rebecca Lynn Burdick**, acknowledged receipt of Summons and Complaint May 6, 1993, but has failed to otherwise appear and is now in default;

(c) the defendant, **Security Pacific Financial Services, Inc.**, was served a copy of the Summons and Complaint on April 28, 1993, by certified mail, restricted delivery, return receipt requested, to its registered agent, The Corporation Company, but has failed to otherwise appear and is now in default;

(d) All other defendants, namely County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, have filed timely answers in this action and have approved the form of this judgment as evidenced by their subscription.

2. This Court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On August 22, 1986, the defendant, Stanley D. Burdick, then a single person, executed and delivered to Mortgage Clearing Corporation a note in the amount of

$35,188.00, payable in monthly installments, with interest thereon at the rate of nine (9%) percent per annum.

4. As security for the payment of such note the defendant, Stanley D. Burdick, executed and delivered to Mortgage Clearing Corporation a mortgage covering the following described property:

> Lot Twelve (12), Block Nineteen (19), IRVING PLACE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Such tract is referred to below as "the Property." This mortgage was dated August 22, 1986, and was recorded with the Tulsa County Clerk September 2, 1986, in book 4966 at page 2606. The mortgage tax due thereon was paid.

5. a) On September 1, 1988, Mortgage Clearing Corporation assigned such promissory note and the mortgage securing it to Triad Bank, N.A. by an assignment recorded with the Tulsa County Clerk July 18, 1989, in book 5195 at page 644.

b) On April 9, 1991, Triad Bank, N.A. assigned such promissory note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by an assignment recorded with the Tulsa County Clerk April 10, 1991, in book 5314 at page 1358.

6. On April 1, 1991, the defendants, Stanley D. Burdick and Rebecca Lynn Burdick, husband and wife, entered into an agreement with the plaintiff lowering the amount of the

monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose.

7. The defendants, Stanley D. Burdick and Rebecca Lynn Burdick, have defaulted under the terms of the note, mortgage and forbearance agreement due to their failure to pay installments when due. Because of such default, the defendants, Stanley D. Burdick and Rebecca Lynn Burdick, are indebted to the plaintiff in the amount of $42,052.26, plus interest at the rate of nine (9%) percent per annum from April 22, 1993, until the date of this judgment, plus interest thereafter at the legal rate 3.54% until fully paid; plus the costs of this action in the amount of $170.00 for abstracting and $8.00 for recording the Notice of Lis Pendens.

8. The defendant, Tulsa County Treasurer, and the defendant, Board of Tulsa County Commissioners, claim no right, title or interest in or to the Property.

9. The personal liability of the defendants Stanley D. Burdick and Rebecca Lynn Burdick, husband and wife, on the debt represented by the subject note and mortgage was discharged in the U.S. Bankruptcy Court the Northern District Of Oklahoma, in case number 91-04575-C, a chapter 7 bankruptcy.

10. Pursuant to 12 U.S.C. 1710(l) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the

mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED that the plaintiff have and recover judgment IN REM against the defendants, Stanley D. Burdick and Rebecca Lynn Burdick, in the principal sum of $42,052.26, plus interest at the rate of nine (9%) percent per annum from April 22, 1993, until judgment, plus interest thereafter at the legal rate 3.54% until paid, plus the costs of this action in the amount of $178.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED that Security Pacific Financial Services, Inc., has no right, title or interest in the Property.

IT IS FURTHER ORDERED that the defendants, Tulsa County Treasurer; and Board of Tulsa County Commissioners claim no right, title, or interest in the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of the defendants, Stanley D. Burdick and Rebecca Lynn Burdick, to satisfy the money judgment of the plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the Property, according to plaintiff's election with or without appraisement and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

Second:

In payment of the judgment rendered herein in favor of the plaintiff;

Third:

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

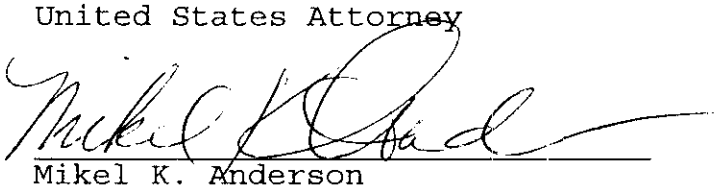
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

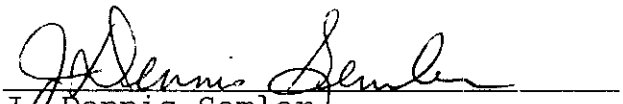
Judgment of Foreclosure
USA v. Burdick
Civil Action No. 93-C-373B

APPROVED:

F. L. DUNN, III
United States Attorney



Mikel K. Anderson
Special Assistant United States Attorney
U.S. Dept. of Housing & Urban Development
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. Dennis Semler
Assistant District Attorney
Attorney for defendants
Tulsa County Treasurer and
Board of Tulsa County Commissioners

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,

Plaintiff,

-vs.-

KENNETH J. BECKMAN;
TANOM BECKMAN;
COUNTY TREASURER,
Tulsa County, Oklahoma; and
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma;

Defendants.

CASE NO. 93-C-436B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7th day of July, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendants, Tulsa County Treasurer and Board of Tulsa County Commissioners appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the defendant, Kenneth J. Beckman, appears not, but makes default; and the defendant, Tanom Beckman, appears not, but makes default.

The Court, being fully advised and having examined the file, finds as follows:

1. The defendant, Kenneth J. Beckman, acknowledged receipt of summons and complaint on May 27, 1993; and the defendant, Tanom Beckman, acknowledged receipt of summons and complaint on May 27, 1993. Such defendants, Kenneth J.

Beckman and Tanom Beckman, have failed to answer or otherwise plead and are therefore in default. All other defendants in this lawsuit filed timely answers.

2. This Court has jurisdiction pursuant to 28 U.S.C. 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On March 14, 1984, the defendants, Kenneth J. Beckman and Tanom Beckman, husband and wife, executed and delivered to Oklahoma Mortgage Company, Inc. a note in the amount of $68,813.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half (12.5%) percent per annum.

4. As security for the payment of such note the defendants, Kenneth J. Beckman and Tanom Beckman, husband and wife, executed and delivered to Oklahoma Mortgage Company, Inc. a mortgage covering the following described property:

> Lot Eleven (11), Block Fifteen (15), WHISPERING MEADOWS, An Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Such tract is referred to below as "the Property." This mortgage was dated March 14, 1984, and was recorded with the Tulsa County Clerk March 16, 1984, in book 4775 at page 1097.

5. On August 1, 1986, Oklahoma Mortgage Company, Inc. assigned such promissory note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington,

D.C., his successors and assigns by an assignment recorded with the Tulsa County Clerk September 26, 1986, in book 4972 at page 1368.

6. On April 3, 1986, the defendants, Kenneth J. Beckman and Tanom Beckman, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1989, and March 1, 1990.

7. The defendants, Kenneth J. Beckman and Tanom Beckman, have defaulted under the terms of the note, mortgage and forbearance agreements due to their failure to pay installments when due and due to their abandonment of the Property. Because of such default the defendants, Kenneth J. Beckman and Tanom Beckman, are indebted to the plaintiff in the amount of $107,011.29, plus interest at the rate of twelve and one-half (12.5%) percent per annum from May 10, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of $207.00 for abstracting and $8.00 for recording the Notice of Lis Pendens.

8. The defendant, County Treasurer, Tulsa County, Oklahoma, claims an interest in the Property by virtue of personal property taxes for tax year 1991, indexed under number 91-03-2810410, in the amount of $41.00.

9. The defendant, Board of Tulsa County Commissioners claims no right, title or interest in or to the Property.

10. Pursuant to 12 U.S.C. 1710(l) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED that the plaintiff have and recover judgment against the defendants, Kenneth J. Beckman and Tanom Beckman, in the principal sum of $107,011.29, plus interest at the rate of twelve and one-half (12.5%) percent per annum from May 10, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of $215.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED that the defendant, Tulsa County Treasurer, have and recover judgment in the amount of $41.00, plus penalties and interest.

IT IS FURTHER ORDERED that the defendant, Board of Tulsa County Commissioners claims no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of the defendants, Kenneth J. Beckman and Tanom Beckman, to satisfy the money judgment of the plaintiff

herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the Property, according to plaintiff's election with or without appraisement and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

Second:

In payment of the judgment rendered herein in favor of the plaintiff;

Third:

In payment of the judgment rendered herein in favor of the defendant, Tulsa County Treasurer.

Fourth:

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED that after the sale of the Property by virtue of this judgment and decree, all of the defendants and all persons claiming under them be forever barred of any

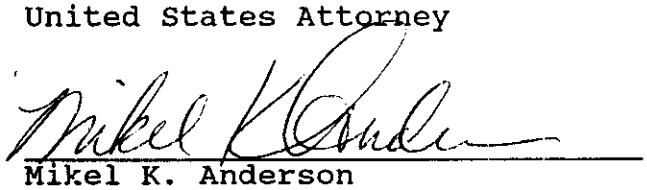
right, title, interest or claim in or to the Property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

F. L. DUNN, III
United States Attorney



Mikel K. Anderson
Special Assistant United States Attorney
U.S. Dept. of Housing & Urban Development
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
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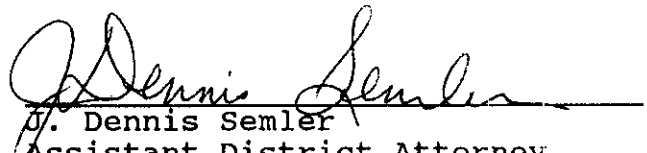

J. Dennis Semler
Assistant District Attorney
Attorney for defendants
Tulsa County Treasurer and
Board of Tulsa County Commissioners

Judgment of Foreclosure
Civil Action No. 93-C-436B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ACCOUNTABILITY BURNS, Plaintiff,	)	
vs.	)	Case No. 76-C-271-B
UNITED STATES OF AMERICA, Defendant.	)	

O R D E R

The Court has received Plaintiff's pro se pleading titled "Request to Reopen & Refile, to Obtain a TRO & EPO Under ADA - 1993, eff. 7-1-93 = Th (yesterday)."

The above styled action was filed June 22, 1976, seeking documents from the Central Intelligence Agency under the Freedom of Information Act. The Court dismissed the action March 7, 1977. Plaintiff now seeks to reopen the action 16 years later to assert a claim under the Americans with Disabilities Act against "Y-Hotel Management" and "Metro Tulsa Y-Staff."

The Court finds no basis for reopening this action and therefore Plaintiff's "Request to Reopen & Refile, to Obtain a TRO & EPO" is hereby DENIED.

IT IS SO ORDERED THIS 7th DAY OF JULY, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

17.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

KAAREN WITTE,

Plaintiff,

vs.

FISCHER EDUCATIONAL SYSTEMS, DRAUGHON COLLEGE INC., and TRAVEL INSTITUTE INC.

Defendants.

Case No. 92-C-376-B

ADMINISTRATIVE CLOSING ORDER

The Defendants having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 7th day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	Case No. 88-C-1341-B
vs.	)	Consolidated with
THOMAS C. HARMON,	)	Case No. 88-C-1344-B
Defendant.	)	

DEFICIENCY JUDGMENT

Deficiency judgment is entered in favor of the Plaintiff, Federal Deposit Insurance Corporation, and against Defendant, Thomas C. Harmon, in the amount of $1,479,294.00 plus interest as recommended by the United States Magistrate Judge in his Order of November 13, 1990 in Case No. 88-C-1344-B, plus the amount of $114,206.69 plus interest as recommended by the United States Magistrate Judge in his Order of November 13, 1990 in Case No. 88-C-1341-B, or a total amount of $1,593,500.69 plus interest.

Dated this 6th day of July, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE